Petition

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

LESLIE R. HINDS, DARLENE THOMAS, CRESCENCIO S. MIRANDA, DANIEL GAILLIARD, and WILLIAM S. SMITH,

Petitioners,

vs.

CONSOLIDATED RAIL CORPORATION and THE UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the Special Court, Regional Rail Organization Act of 1973

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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QUESTION PRESENTED FOR REVIEW

Whether the provisions of the Staggers Rail Act of 1980, which changed the previously established uniform formula for determining income protection for the three generic classes of represented employees of the Consolidated Rail Corporation, with the purpose and effect of substantially denying supplemental income protection for the non-operating and maintenance-of-way employees while retaining it for the operating employees, violate the equal protection component of the Fifth Amendment's due process clause?

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On Writ of Certiorari to the Special Court, Regional Rail Organization Act of 1973

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

Petitioners pray that a writ of certiorari issue to review the judgment of the Special Court, Regional Rail Reorganization Act of 1973, entered on July 22, 1981, petition for reconsidera-

tion denied on September 2, 1981.

OPINIONS BELOW

The Memorandum Opinion and Order of the Special Court, Regional Rail Reorganization Act of 1973 (hereinafter "Special Court") is not yet reported; it is set out in the Appendix, infra, at 1-A. The Memorandum Opinion and Order of the Special Court, enjoining proceedings in the United States District Court for the Eastern Distirct of Michigan, is reported at 512 F. Supp. 1331 (Sp.Ct.R.R.R.A. 1981), and is set out in the Appendix, infra, at 27-A.

JURISDICTION

The judgment of the Special Court was entered on July 22, 1981. (1-A). The petition for reconsideration was denied on September 2, 1981. (23-A). The jurisdiction of this Court is invoked under 45 U.S.C. § 719 (e)(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

"No personal shall * * * be deprived of life, liberty, or property, without due process of law * * *."

STATUTE INVOLVED

The statute involved is Subchapter V of the Staggers Rail Act of 1980, which amends the Regional Rail Reorganization Act of 1973. 45 U.S.C. §§ 771-780. Because these provisions are lengthy, they are set forth in the Appendix, infra, at 67-A. The amended provision, § 505 of the Regional Rail Reorganization Act of 1973, 87 Stat. 1015-1019, is also lengthy and is set forth in the Appendix, infra, at 57-A.

STATEMENT OF THE CASE

The petitioners, plaintiffs below, represent the class of non-operating and maintenance-of-way employees of

the Consolidated Rail Corporation, (hereinafter Conrail) who are eligible for employee income protection under Title V of the Regional Rail Reorganization Act of 1973, as amended by the Staggers Rail Act of 1980. The plaintiffs originally instituted an action in the United States District Court for the Eastern District of Michigan, challenging as unconstitutional under the equal protection component of the Fifth Amendment's due process clause, the provisions of the § 501(b) of the Staggers Rail Act of 1980, insofar as those provisions provided different formulae for determining the income protection to which operated employees were entitled, on the one hand, and to which non-operating and maintenance-of-way employees were entitled, on the other hand. Conrail, joined by the

United States, instituted proceedings before the Special Court to enjoin the plaintiffs from prosecuting that action, and on May 1, 1980, the Special Court held that it had exclusive jurisdiction over the constitutional claim asserted by the Plaintiffs and issued the injunction. Thereafter, on May 22, 1981, the plaintiffs filed the present action before the Special Court. Conrail and the United States filed a motion for summary judgment, and the plaintiffs filed a cross-motion for summary judgment. Following briefing and argument, the Special Court, on July 22, 1981, entered a memorandum opinion and order, granting the motion of Conrail and the United States for summary judgment and denying the plaintiffs' motion for summary judgment. Plaintiffs filed a timely petition for reconsideration, which was denied by the

Special Court without comment on September 2, 1981.

The Regional Rail Reorganization Act of 1973, 45 U.S.C. §701, et seq., was designed to reorganize the major railroads in the northeast and midwest region into an economically viable system capable of providing adequate and efficient rail service to the region. The Act provided for the conveyance of the properties of these railroads to Conrail, for the disposition of those properties that were not necessary for the efficient operation of Conrail, and for the discontinuation of certain rail services previously furnished by these railroads. Conrail now operates rail service in the region pursuant to a "Final System Plan".

Prior to the reorganization of the various railroads into Conrail, these railroads had entered into

widely varying collective bargaining agreements with the different unions representing the different classes and crafts of railroad employees. These agreements often contained job stabilization provisions, guaranteed employment rights and other employment "arbitraries" for the different classes and crafts of railroad employees. In the Regional Rail Reorganization Act of 1973, Congress sought to abolish these widely varying collective bargaining agreements and the job stabilization and income protection provisions they contained, so that Conrail would be free to assign work in the most efficient manner and to eliminate uneconomical service.

Section 503 of the Act gives Conrail broad powers to reassign and consolidate the work formerly performed on the rail properties it

acquired pursuant to the Act. Section 504 directs that there shall be a single implementing collective bargaining agreement for each class and craft of employees and that the new collective bargaining agreement "shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those prescribed herein." As Conrail consolidated the work formerly performed on the rail properties of the predecessor railroads and as it entered into a single collective bargaining agreement with the unions representing each class and craft of employees, employment rights, job stabilization and income protection existing under the former collective bargaining agreements were necessarily modified or eliminated.

Section 505 of the Act established

a system of income protection that was designed to replace the job stabilization and income protection guarantees that were enjoyed by the employees under the former collective bargaining agreements. See House Report 93-620, 93rd Cong., 1st Session, p.38 (1973). This system of income protection was negotiated by representatives of railway labor and management, and was adopted by Congress virtually unchanged. See Senate Report No. 96-784, 96th Cong., 2d Sess., p.3 (1980). As the Special Court recognized, Congress established the system of income protection to secure labor peace and political support for the consolidation. (16-A).

The basic theory of employee income protection was set forth in § 606(a):

> "A protected employee whose employment is governed by a

> collective bargaining agreement will not, except, as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto."

Income protection was available both to employees who were "deprived of employment", that is, who were laid off indefinitely or temporarily, and to employees who were "adversely affected with respect to . . . compensation," that is, who continued to be employed by Conrail, but whose compensation level declined because of changes brought about by the reorganization. The form of protection for the

"adversely affected" employees will be referred to as "supplemental income protection."

All protected employees were given a prescribed monthly displacement allowance (MDA). Under § 505(b) of the Act, the monthly displacement allowance for the three generic classes of represented employees, operating, non-operating and maintenance-of-way, was computed according to a uniform formula, and was based on the total compensation received by the employee, including overtime, vacation allowances, and monthly compensation guarantees, during the twelve months preceding January 1, 1975. The employee's total time paid for during that period was also calculated. Dividing these annual totals by twelve produced an average monthly compensation and average monthly time paid for each

employee. If in any month an employee earned less in his current position than his average monthly compensation, he received an additional payment equal to the difference, up to $2,500. If in any month an employee worked more hours in his current position than his average monthly time paid for, he received an additional payment equal to the hourly rate for his current position multiplied by the excess hours. The monthly displacement allowance was adjusted for general wage increases in the industry. (5-A). Under § 505(c), employee income protection continued until the employee attains age 65, provided that the employee had five or more years of service as of 1974.

The Act contained additional provisions for the transfer, termination and severance of employees of the predecessor railroads, and for the

payment of termination and separation allowances. Although Conrail was legally responsible for the payment of the monthly displacement allowances, termination and separation allowances and other costs associated with the income protection program, Congress appropriated the sum of $250,000,000 to cover the anticipated aggregate cost of the program. It was anticipated that a substantial number of employees would accept the severance of employment in exchange for a separation allowance, and that the aggregate sum of $250,000,000 would not finally be expended until the year 2021, when the last Conrail employee eligible for income protection would retire.

The aggregate sum of $250,000,000 however, was exhausted by 1980. The anticipated voluntary severance of employment in exchange for a

separation allowance had not occurred. The employees entitled to income protection were staying on, and as a result of the consolidation of operations and the adoption of the single implementing agreements, were receiving the monthly displacement allowances. The monthly displacement allowances paid to employees who were continuing to work for Conrail consumed most of the funds. Approximately 13,000 employees per month were submitting claims, the typical claim was for $40 per month, and about $5.2 million each month was expended on the allowances. (5-A). According to data submitted by Conrail to the Special Court, for the three classes of represented employees, in the five year period from April, 1976 through March, 1981, approximately $163,000,000 was expended for "partial claims", that

is, for "supplemental income protection", as opposed to $56,000,000 for "full claims". And as between the three classes of represented employees, the data showed that the average claim of the operating employees was much larger than the average claim of the non-operating and maintenance-of-way employees, e.g., in 1979, the average claim of the operating employees was $444, compared to an average claim of $296 for the non-operating and maintenance-of-way employees.

When the initial appropriation of $250,000,000 was about to be exhausted in 1980, Conrail and the United States Department of Transporation made a joint proposal to the Congress for an additional appropriation and for a modification in

the existing income protection program. The proposed modification provided different formulae for computing the monthly displacement allowances for the three generic classes of represented employees. The express purpose for providing the different formulae for the different classes of employees, according to testimony of officials of the Department of Transportation and Conrail before the Congress, was to eliminate supplemental income protection for the covered non-operating and maintenance-of-way employees, although it was to be retained for the covered operating employees. Hearings before the House Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, Feb. 21, 1980, pp. 5-6 (testimony of Mr. James), pp. 23-24, (testimony of

Mr. Sweeney). The proposed modifications were accepted by the Congress and were incorporated into the Staggers Act.

The elimination of supplemental income protection for covered non-operating and maintenance-of-way employees was accomplished by removing past overtime earnings and other "extra" earnings from the computation of their monthly displacement allowance. Under the Staggers Act the monthly displacement allowance for maintenance-of-way employees is based on the straight-time hourly rate for 1974, and the monthly displacement allowance for non-operating employees is based on the straight-time hourly rate for the employee's position as of September 1, 1979. Conrail assumed that it would provide all covered non-

operating and maintenance-of-way employees with a 40 hour work week, and this, combined with limiting their monthly displacement allowance computation to past straight-time earnings only, would insure that they would not receive supplemental income benefits. Hearings, supra, at pp. 23-24 (testimony of Mr. Sweeney).

As regards the operating employees, however, the proposal of the Department of Transportation and Conrail, which also was accepted by Congress and incorporated into the Staggers Act, was that their monthly displacement allowance would continue to be based on past total compensation, including overtime and other "extras". Under the Staggers Act, the monthly displacement allowance for operating

employees is computed on the basis of average total 1977 compensation, including overtime and "arbitraries" for each Interstate Commerce Commission class of operating employee. Monthly displacement allowances above the 1977 "cap" are reduced to the "cap", but with this exception, operating employees still would have a monthly displacement based on past total earnings, and as intend, would continue to receive supplemental income protection.

The 1980 changes have had the intended effect, and despite a down turn in economic conditions, supplemental income protection became substantially reduced for non-operating and maintenance-of-way employees. According to data submitted by Conrail in the Special Court, from November, 1980, when the new formulae went into effect, through March, 1981, the

latest date for which figures are available, the number and amount of "partial claims" for each generic class of represented employee was as follows:

	Number of Claims	Dollar Value of Claims
Operating employees	7667	$3,665,000
Non-operating employees	1825	$ 757,000
Maintenance-of-way	375	$ 286,000

The gravament of the plaintiffs' constitutional contention is that this discrimination between operating employees on the one hand, and non-operating and maintenance-of-way employees on the other hand, with respect to the formulae for computing the monthly displacement allowance, is violative of the equal protection component of the Fifth Amendment's due process clause.

In the present case, Congress

expressly stated its purpose in classifying between the three generic classes of represented employees with respect to the formulae for determining the monthly displacement allowance, so that the monthly displacement allowance for the operating employees would be based on past total compensation while the monthly displacement allowances for the non-operating and maintenance-of-way employees would be based on past straight-time earnings only. As the Special Court put it: "Overtime pay and arbitraries for operating employees, unlike the other class, was regarded by Congress in 1980 as a customary part of their compensation." (10-A). The language in the relevant legislative history cited by the Special Court is as follows:

> "A third formula is necessary for operating employees (train and engine service) because their

wage structure is totally different from that of all other railroad employees. The basic rate of pay for these employees is based on complex formulae that relate to train miles and/or hours worked. Furthermore, unlike non-operating employees, the basic rate for operating employees is usually adjusted upward or downward to reflect overtime and arbitrary payments that a particular operating craft might or might not be expected to receive. Thus overtime and arbitrary payments should be considered a part of the wage structure for operating employees, and the application of the non-operating formulae to operating employees would adversely impact these employees with respect to the non-operating employees." Senate Report 96-784,

96th Cong., 2d Session (1980),
pp. 8-9 (emphasis added).

As indicated by the above language, the express purpose of the classification was to make the compensation guarantee for each class of represented employees depend on the basic compensation structure for that class of employee. In making that classification, Congress proceeded on the factual premises, based on information provided to Congress by Conrail, that overtime and "arbitraries" were part of the basic compensation structure for the operating employees and were not a part of the basic compensation structure for the non-operating and maintenance-of-way employees.

Before the Special Court the plaintiffs demonstrated, without contravention by Conrail or the United States, and without any indication of disagreement on the part of the Court,

that the factual premises on which Congress proceeded in this regard was completely inaccurate. The plaintiffs demonstrated that overtime and "arbitraries" are not a part of the basic compensation structure for the operating employees,[1] and that

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[1] As the Special Court noted, the "complex formulae" referred to in the Senate Report is a reference to the "dual basis of pay" rule (13-A), and the "dual basis of pay" rule deals only with how the straight-time pay of operating employees is to be determined: it means that a day's pay for these employees consists of eight hours or 100 miles, with work in excess of either standard paid at specified overtime rates. (10-A). In no way is overtime built into their basic compensation structure, and as the Special Court recognized, whether a given operating employee gets overtime work depends entirely on how the railroad schedules its road service operations, just as a non-operating employee will get overtime work if the railroad chooses to schedule him for more than an eight hour day. (14-A). Likewise the entitlement to "arbitraries" is not build into the basic rate structure of road freight service operating employees. They will receive "arbitraries" only insofar as they are provided for in collective bargaining agreements ("arbitraries" for the other generic classes of represented employees were also contained in the prior collective bargaining agreements) and only insofar as the railroad chooses to schedule its operations so as to make "arbitraries" available.

the three generic classes of represented employees have the identical basic compensation structure: straight-time pay for an eight hour day,[2] over time pay for work beyond the eight hour day, and "arbitraries" as negotiated in collective bargaining agreements. The Special Court held, however, that the plaintiffs' demonstration of the inaccuracy of the factual premises on which the classification was expressly based did not matter, because Congress could have assumed that operating employees generally received a larger proportion of their compensation in the form of "extras" than did the other classes of represented employees, so that the purpose of the classification

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[2] An eight hour day is defined as a 100 mile run for road freight service operating employees. At most, 35% of Conrail's operating employees are engaged in road freight service at any one time. (14-A).

could have been to take account of the proportion of "extra" compensation assumed to be received by operating employees in comparison to the proportion of "extra" compensation received by non-operating and maintenance-of-way employees.

The Special Court upheld the constitutionality of the classification and the resulting treatment of the operating employees with respect to the availability of supplemental income protection, and granted the defendants' motion for summary judgment. The plaintiffs' petition for reconsideration was denied without comment.[3]

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[3]Subsequent to the judgment of the Special Court in the present case, Congress enacted the Northeast Rail Service Act of 1981, which eliminated the system of employee income protection contained in the Regional Rail Reorganization Act of 1973 and the Staggers Act, and substitute a new form of income protection for Conrail employees who are deprived of railroad employment. Section 1144 of the new Act specifically provides for recovery of accrued benefits to which protected employees were entitled through October 1, 1981, and much of the $235 million appropriated by Congress under the Staggers Act is still available for the payment of such benefits. The claims of the members of the plaintiff class in the present case

for monthly displacement allowances in the period October 1, 1980 through October 1, 1981, if their monthly displacement allowances were computed according to the same formula that the Staggers Act uses to compute the monthly displacement allowances for operating employees, total into the millions of dollars. The grant of certiorari by this Court, therefore, is of the utmost importance to the members of the plaintiff class, notwithstanding the subsequent change in the law.

REASONS FOR GRANTING THE WRIT

I.

The present case is an appropriate vehicle for the consideration by this Court of the proper criteria governing equal protection challenges to classifications contained in social and economic legislation, and it is necessary that this Court definitively set forth such criteria.

This Court's doctrinal approach to the criteria governing equal protection challenges to classifications contained in social and economic legislation has been articulated in terms of a two-tier standard of review. This Court has stated that unless the law employs a classification that is inherently invidious or that impinges on fundamental rights, the Court exercises only a "limited review power", and must sustain the classification so long as the legislation "classif(ies) the persons it affects in a manner rationally related to

legitimate governmental objectives." Schweiker v. Wilson, U.S. 101 S. Ct. 1074, 1080 (1981). It is respectfully submitted, however, as some Members of this Court have pointed out in separate opinions, that the results of the Court's decisions in cases involving equal protection challenges do not lend themselves to explanation in terms of the two-tier standard of review. It has also been contended that a two-tier standard of review to equal protection challenges is not consistent with the underlying objectives of the Equal Protection Clause.[4]

Adherence to the two-tier standard of review as a doctrinal approach to the resolution of equal protection challenges not only makes the result in some cases

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[4] As Justice Stevens put it: "There is only one Equal Protection Clause. It requires every state to govern impartially. It does not direct courts to apply one standard of review in some cases and a different standard in other cases." Craig v. Boren, 429 U.S. 190, 211-212 (1976) (Stevens, J.concurring).

appear to depend on which standard of review is being applied, see e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), but obscures the careful balancing of individual and governmental interests that realistically can explain the results of this Court's equal protection decisions. As Justice Stevens has stated:

> "I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identication of that standard than an attempt to articulate it in all-encompassing terms." Craig vs. Boren 429 U.S. 190, 212 (1976) (Stevens, J. concurring).

Similarly, as Justice Marshall has stated:

> "A principled reading of what this Court has done reveals that it has applied a spectrum of standards (which) clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the

particular classification is drawn." San Antonio Independent School District vs. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

See also the discussion by Justice White in Vlandis vs. Kline, 412 U.S. 441, 458-459 (1973)(White, concurring). With all due respect, if there is a difference between this Court's articulated doctrinal approach to equal protection challenges and its approach in practice to such challenges, it is vitally necessary that this Court bring its articulated approach into congruence with its actual practice.

Nowhere is the need for this Court to definitively set forth the proper criteria governing equal protection challenges more apparent than in the area of classifications that are not "inherently invidious" or do not impinge on "fundamental rights." While the Court's articulated doctrinal approach directs that such classifications be tested under the "rational basis" standard of review, the

results in the cases applying that standard are difficult to explain consistently within the analytical framework of that standard. In some cases, the Court appears to have given very litty scrutiny to the relationship between the classification and the advancement of a legitimate governmental interest, and is those cases it has emphasized the broad discretion of the legislature to classify in the enactment of social and economic legislation. See e.g., New Orleans vs. Dukes, 427 U.S. 297 (1976); McGowan vs. Maryland, 366 U.S. 420 (1961); Cleland vs. National College of Business, 435 U.S. 213 (1978). In other cases, the Court, while applying the purportedly less restrictive "rational basis" standard, appears to have given very careful scrutiny to the relationship between the classification and the advancement of the asserted governmental interest, sometime upholding the classification following such scrutiny, see e.g., Johnson vs.

Robinson, 415 U.S. 361 (1974), New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), Dandridge v. Williams, 397 U.S. 471 (1970), and sometimes invalidating it. See e.g. Eisenstadt v. Baird, 405 U.S. 438 (1972); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Jiminez v. Weinberger, 417 U.S. 628 (1974); Trimble v. Gordon, 430 U.S. 762 (1977). In some cases, the Court has hypothesized a legislative purpose for the classification from a sparse legislative record, see e.g., Schweiker vs. Wilson, U.S. (1981), or has looked for plausible reasons for the classification, see e.g., United States Railroad Retirement Board v. Fritz, __U.S.__, 101 S.Ct. 453 (1980), but in others it has held that the hypothesized legislative purpose could not reasonably be regarded as the real purpose underlying the classification. See e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972). As this Court has candidly recognized in regard

to its decisions under the "rational basis" standard of review: "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under the Equal Protection Clause." United States Railroad Retirement Board v. Fritz, supra at p. 460, n. 10. This Court itself appears to be internally divided over precisely how this standard of review is to be applied. As Justice Powell has stated: "The Court has employed numerous formulations for the 'rational basis' test. Members of the Court continue to hold divergent views on the carity with which a legislative purpose must appear, and about the degree of deference afforded the legislature in suiting means to end." Schweiker v. Wilson, supra at p. 1087, n. 4 (Powell, J., dissenting) (citations omitted). See also the discussions by Justice Rehnquist in Trimble v. Gordon, supra, at pp. 781-786. (Rehnquist J., dissenting).

The failure of this Court to definitely set forth the criteria governing equal pretection challenges to classification contained in social and economic legislation and particularly its failure to delineate the proper application of the "rational basis" test, have resulted in widely varying interpretations of the proper standard of equal protection review by the lower courts. At one end of the spectrum are cases such as Medora v. Colautii, 602 F. 2d 1149 (3rd Cir. 1979), and Planned Parenthood of Minnesota v. State of Minnesota, 612 F. 2d 359 (8th Cir.), aff'd mem., ___U.S. _____, 100 S. Ct. 3039 (1980), where the courts, applying the purportedly less restrictive "rational basis" test, invalidated state welfare and regulatory classifications respectively. In those cases, the courts carefully scrutinized the relationship between the classification and the asserted purpose, and considered whether the asserted purpose

could be advanced by means other than the classification in question and the resulting interference with the interests of the disfavored group. At the other end of the spectrum is the present case, where the special Court, seemingly applying the same "rational basis" standard, held that if the classification was not "rationally related" to the express purpose for which it was made, because the factual premise under which Congress proceeded was shown to be incorrect, it was proper to then hypothesize another possible purpose and to hold that the classification was 'rationally related' to the advancement of that purpose. It is abundantly clear that the courts in Medora and Planned Parenthood, on the one hand, and the special court in the present case, on the other hand, were not applying the same criteria to the resolution of the equal protection challenges, although they were supposedly following the same doctrinal standard. It is imperative that this Court

set forth the proper criteria for the resolution of equal protection challenges, so that the lower federal courts will have concrete guidelines for the consistent interpretation and application of the Equal Protection Clause.

The petitioners respectfully submit that such criteria can be found by looking to the results of this Court's decisions in equal protection cases and to the factors that have influenced those decisions. These results can be explained consistently within the framework of a sliding scale standard of review, with the degree of scrutiny in each case depending on the basis of the classification and on the nature and importance of the asserted governmental and individual interests. Again, as Justice Stevens has stated, the Court has applied "a single standard in a reasonably consistent fashion." Craig v. Boren, supra at p. 212 (Stevens, J., concurring).

This Court's application of the sliding

scale standard of review may be illustrated first by a consideration of the Court's treatment of classifications on the basis of identifiable group membership. Where the classification is on the basis of race or ethnic origin, the Court has imposed the highest degree of scrutiny and has insisted that the legislative purpose be clearly identified, that it be substantial, that the need for the classiciation be supported by abundant evidence, and that the classification be precisely tailored to the advancement of the legislative purpose. See e.g., Fullilove v. Klutznick, ___U.S.___, 100 S. Ct. 2758 (1980). Where the classification is on the basis of gender, the Court has also imposed a high degree of scrutiny, and in the practice has sustained gender-based classifications only when they are clearly related to overcoming the present consequences of past discrimination against women as a group, compare Califano v.

Webster, 430 U.S. 313 (1977), with Orr v. Orr, 440 U.S. 268 (1970), or when the classification relates to sexual differences between men and women so that men and women are not in fact similarly situated with respect to the matter in issue. See Michael M. v. Superior Court, ___U.S.___, 101 S. Ct. 1200 (1981); Rostker v. Goldberg, ___U.S.___, 101 S.Ct. 2646 (1981).

On the other hand, when dealing with classifications on the basis of alienage, the Court, while invalidating traditional forms of discrimination against aliens, see e.g., Graham v. Richardson, 403 U.S. 365 (1971), Sugarman v. Dougall, 413 U.S. 634 (1973), has focused primarily on the nature and importance of the asserted governmental interest. Because of the federal government's plenary power over naturalization and immigration, there has been difference to classifications on the basis of alienage when made by the federal government that has not been shown when

such classification are made by the states. Compare Mathews v. Diaz, 426 U.S. 67 (1976), with Nyquist v. Mauclet, 432 U.S. 1 (1977). The states, however, have been permitted to classify on the basis of alienage in regard to the performance of important governmental functions. Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978). So, while the Court has articulated both the "strict scrutiny" and "rational basis" standards of review in dealing with classifications on the basis of alienage, compare Graham v. Richardson, supra, with Ambach v. Norwick, supra, the results in all of the cases can be explained consistently only in terms of a sliding scale standard.

Likewise, in the area of legitimacy-based classifications, the Court, although applying the purportedly less restrictive "rational basis" test, has given careful scrutiny to the relationship between the legitimacy-based classifications and the advancement of a valid governmental interest.

It has held that the state's interest in deterring illicit sexual relations cannot be relied upon to justify legitimacy-based classifications. Aetna Casualty & Surety Co. v. Weber, 406 U.S. 164 (1972). It has scrutinized with considerable rigor the state's justification for the statutory disinheritance of illegitimate children, and has held that the state can go no further than to condition inheritance on a judicial declaration of paternity during the father's lifetime. Compare Trimble v. Gordon, 430 U.S. 762 (1977), with Lalli v. Lalli, 439 U.S. 259 (1978). It has allowed the state to classify on the basis of legitimacy in regard to welfare programs only where illegitimate children who met the statutory criteria for the benefit would receive it and the challenge was to an alleged overinclusiveness in the classification. Compare Mathews v. Lucas, 427 U.S. 495 (1976), with Jiminez v. Weinberger, 417 U.S. 628 (1974). But when Congress,

acting pursuant to its naturalization and immigration power, has distinguished between legitimate and illegitimate children, the Court has accepted with very little scrutiny the proffered justification for the classification. Fiallo v. Bell, 430 U.S. 787 (1977).

The sliding scale standard of review also furnishes a consistent explanation for the Court's decisions in other cases involving equal protection challenges to classifications contained in social and economic legislation. Where the classification impinges on a very important individual interest, such as marriage or procreation, the Court has carefully scrutinized the proffered justification for the classification and the relationship between the classification and the advancement of a valid governmental interest, regardless of whether it was applying the "strict scrutiny" standard, as in Zablocki v. Redhail, 434 U.S. 374 (1978),

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or the "rational basis" standard, as in Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court has likewise applied careful scrutiny to classifications contained in welfare programs designed to provide the basic necessitieis of life for low-income people, regardless of whether the classification also implicated a "fundamental right," as in Shapiro v. Thompson, 394 U.S. 618 (1969), or whether it was to be tested under the "rational basis" standard, as in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973). The same careful scrutiny was employed in the cases where this Court sustained classifications contained in social welfare programs benefiting low-income people. For example, in Dandridge v. Williams, 397 U.S. 471 (1970), the Court found that the maximum grant limitation was designed to maintain some semblance of an equitable balance between faimilies on welfare and those supported by an employed bread-winner, and

was appropriately tailored to advancing this purpose notwithstanding some inevitable overinclusiveness and underinclusiveness.

The lowest degree of scrutiny has been given to classifications contained in regulatory laws that are challenged as underinclusive by parties who admittedly can be made subject to the regulation. The interest in avoiding an otherwise proper regulation because others are not included within its scope would not seem to be a very important one, and as this Court has emphasized, the legislature is entitled to deal with what it considers to be the most serious aspect of the problem at a given time. Such challenges have uniformly been rejected by this Court. See e.g., New Orleans v. Dukes, 427 U.S. 297 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Minnesota v. Clover Leaf Creamery Co., ___U.S.___, 101 S. Ct. 715 (1981). Where, however, the classification implicates a more substantial interest, such as the right

to work, the Court has scrutinized the proffered justification more carefully, and has balanced the individual's employment interest against the state's claim that the classification and the resultant interference with the individual's right to work were necessary to advance important governmental objectives. Thus, in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), the Court found that the exclusion of methadone users from employment with the Transit Authority served the objectives of safety and efficiency and that it would have been impracticable for the Authority to try to make an individual determination of each user's suitability for employment. Similarly, in Vance v. Bradley 440 U.S. 93 (1979), the Court went to great lengths to show why the mandatory retirement of Foreign Service officers at age 60 advanced important governmental interests.

The Court has also in practice given a good deal of scrutiny to classifications

contained in social welfare programs involving "expectations" or "entitlements." Here, the emphasis has been on whether the disfavored group was similarly situated to the favored group with respect to the need and statutorily-defined entitlement to the benefit. For example, in Johnson v. Robinson, 415 U.S. 361 (1974), the Court found that conscientious objectors who performed alternative service were not similarly situated to military veterans with respect to the entitlement to educational benefits. This was because the disruptions in the lives of veterans due to their military service were "qualitatively different" from the disruptions in the lives of those who performed alternative civilian service, both in terms of the length of the obligation and in terms of the interference with personal freedom. And in Railroad Retirement Board v. Fritz, ___U.S.___, 101 S. Ct. 453 (1980), the Court, despite language in the opinion indicating deference

to legistlative judgment, found that the distinction between railroad employee who had a current connection with a railroad and those who did not, was related to the relative equities of the employees and advanced the purpose of providing greater benefits for career employees. As the Court concluded:

> "Congress could assume that those who had a current connection with the railraod industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who left the industry in 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed." 101 S. Ct. at 461.

The favored group and the disfavored group then were not similarly situated with respect to the matter in issue, in view of the purpose of the Congress in providing the particular benefit.

The petitioners would further submit that the results of this Court's decided cases also indicate the factors that this Court takes into account when it is apply-

ing the sliding scale standard of review. These factors are as follows: (1) the basis of the classification; (2) the nature and importance of the individual interest that is adversely affected by the classification; (3) the nature and importance of the governmental interest purportedly advanced by the classification; (4) the availability of alternative means to advance the asserted governmental interest other than by the classification in question; (5) in regard to classifications contained in social welfare programs involving "expections" or entitlements," the extent to which the disfavored group is similarly situated to the favored group with respect to the need and statutorily-defined entitlement to the benefit.[5]

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[5] In particular cases, of course, other factors may also assume some relevance. In the present case, for example, it may be relevant that when Congress originally established the program of income protection for Conrail employees in 1973, it treated the three

generic classes of represented employees equally, and that when the formulae were modified in 1980, the underlying premises upon which the income protection program had been established had not changed. In such circumstances, the disparate treatment of the three generic classes of represented employees, whom Congress had originally treated fully equal, should require a greater degree of justification than would be the case if the disparate treatment had been imposed the first time around. Likewise, it may also be relevant that the favored class of operating employees consists virtually entirely on white males, while blacks and hispanics comprise about 25% of the protected maintenance-of-way employees, and blacks, hispanics and women comprise about 15% of the protected non-operating employees. While it cannot be shown that Congress intentionally acted to discriminate on racial or gender grounds, the fact that the change of the formulae was for the benefit of the class consisting virtually entirely of white males may properly invoke some degree of skepticism.

The express adoption of the slikding scale standard of review by this Court, and the delineation of the above factors as the criteria governing equal protection challenges under that standard, will go a long way toward clearing up the confusion that now exists in this area of law and will insure that there will be "only one Equal Protection Clause."

The present case is a particularly appropriate vehicle for the express adoption of the sliding scale standard of review by this Court. In the present case, the Special Court took an extremely deferential approach to determining the constitutionality of legislative classifications, reaching the point of virtual judicial abstention. It hypothesized a legislative purpose for the classification that was completely different from the purpose expressly stated by Congress. Congress expressly stated that its purpose in classifying between the three generic classes of represented employees

with respect to the formulae for determining the monthly displacement allowance, so that the monthly displacement allowance for the operating employees would be based on past total compensation while the monthly displacement allowance for the non-operating and maintenance-of-way employees would be based on past straight-time earnings only, was that overtime pay and "arbitraries" were a part of the basic compensation structure for operating employees while they were not for the non-operating and maintenance-of-way employees. The Plaintiffs demonstrated, without contravention by Conrail or the United States, and without any indication of disagreement on the part of the Special Court, that the factual premise on which Congress proceeded in this regard was completely inaccurate. They demonstrated that overtime pay and "arbitraries" are not a part of the basic compensation structure for operating employees and that the three generic classes of represented employees

have the identical basic compensation structure. The plaintiffs therefore, did more than demonstrate, "that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley,supra at p. 111. They demonstrated that the legislative facts on which the classification was expressly based were not in fact true and that Congress was completely mistaken in the factual premise under which it had proceeded.

The Special Court, however, went on to hypothesize a purpose that was not in fact the purpose of Congress. It said that Congress could have assumed that operating employees generally received a larger proportion of their compensation in the form of "extras" than did the other classes of represented employees, so that the purpose of the classification could have been to take account of the proportion of "extra"

compensation assumed to be received by operating employees in comparison to the proportion of "extra" compensation received by non-operating and maintenance-of-way employees. But Congress did not assume this, and the classification was not in fact based on this assumption. Congress assumed that the operating employees were entitled to overtime and "arbitraries" as a part of their basic compensation structure, and it was for this reason that Congress said that it based the monthly displacement allowance of the operating employees on their past total compensation rather than on their past straight-time earnings only. In view of the stated purpose of Congress for making the classification, the only reasonable assumption that properly could be imputed to Congress is that if overtime and "arbitraries" were not a part of the basic compensation structure of operating employees, Congress would not have made the classification that it did, and would have

used the same formula to determine the monthly displacement allowance for the three generic classes of represented employees.

There can be no doubt that if the Staggers Act's classification between the three generic classes of represented employees were tested under the sliding scale standard of equal protection review that, it is submitted, this Court has been applying in practice, the classification and the resulting discrimination against the non-operating and maintenance-of-way employees would be held to be unconstitutional. The three generic classes of represented employees are identically situated with respect to the need and statutorily-defined entitlement to supplemental income protection. The system of income protection for Conrail employees established by the Regional Rail Reorganization Act of 1973 was designed to replace the job stabilization and income

protection guarantees that were enjoyed by all classes of employees under the former collective bargaining agreements, and all classes of employees would be "adversely affected with respect to compensation" by the reassignment of work and the elimination of uneconomical service that would follow upon the reorganization and the adoption of the single implementing collective bargaining agreement. The basic compensation structure for the three generic classes of represented employees was identical, and Congress was simply mistaken in concluding that the basic compensation structures were different. The discrimination effected against the non-operating and maintenance-of-way employees by the classification contained in the Staggers Act cannot be justified in any way and should not be held to be violative of equal protection. The constitutionality of the classification was upheld by the Special Court only because of that court's interpre-

tation of the criteria governing an equal protection challenge under the "rational basis" standard, and would not have been upheld by that court under the sliding scale standard of review that, it is submitted, this Court has been applying in practice. The present case, therefore, is a particularly appropriate vehicle for the express adoption of the sliding scale standard of review by this Court.

This Court should grant certiorari in this case so that it may definitively set forth the proper criteria governing equal protection challenges to classifications contained in social and economic legislation.

II.

This Court should grant certiorari in the present case so that it may establish, at a minimum, clear guidelines for the application of the "rational basis" standard of review in equal protection challenges to classifications contained in social and economic legislation.

As pointed out previously, the most serious difficulty caused by the two-tier standard of review approach to equal protection challenges arise in regard to classifications that are to be tested under the "rational basis" standard. In large part this difficulty is due to the fact that this standard does not appear to have been applied in a uniform or consistent manner by this Court, United States Railroad Retirement Board v. Fritz, supra, at p. 460, n. 10, and because "(t)he Members of the Court continue to hold divergent views on the clarity with which a legislative pruspose

must appear, and about the degree of deference afforded the legislature in suiting means to ends." Schweiker v. Wilson, supra at p. 1087, n4 (Powell, J. dissenting). There is the danger, at least as far as the lower courts are concerned, that "rational basis" may become synonymous with "non-reviewable" and that any classification that is to be tested under this standard will almost automatically be upheld.

With all due respect to the Special Court and to its distinguished membership, this is what happened in the present case. The Special Court emphasized the very limited nature of scrutiny that it considered to be appropriate under the "rational basis" standard, and sustained the classification on the basis of a hypothesized legislative purpose that was completely different from the prupose expressly stated by Congress. It perhaps was not unjustifiable for the Special Court

to think that this was a proper course of action in a case coming within the "rational basis" standard, in light of the extreme deference sometimes counseled by this Court in its application of that standard. See e.g., United States Railroad Retirement Board v. Fritz, supra, at pp. 459-460. As demonstrated previously, however, the results of this Court's decisions and the method of its analysis in the "rational basis" cases do not support such extreme deference. Unless "rational basis" is to become synonymous with "non-reviewable", at least in the eyes of some courts, this Court must establish clear guidelines for the application of the "rational basis" standard of review.

This Court should make it clear that where, as in the present case, Congress or a state legislative body has expressly stated its purpose for making a particular classification, the "rationality" of that

classification and its relationship to the advancement of a legitimate governmental interest must be tested with reference to the stated purpose of the classification. Where, as here, it is shown without contravention, that the legislative body was mistaken in the factual premise on which the classfication was based, so that the disfavored group is in fact similarly situated to the favored group with respect to the matter in issue, the classification and the resulting discrimination against the disfavored group should be held to be invalid under the "rational basis" standard.

This Court should also establish guidelines as to the clarity with with a legislative purpose must appear. While it may not be necessary that a legislative body "articulate its reasons for enacting a statute", United States Railroad Retirement Board v. Fritz, supra, at p. 461, there is

a difference between the situation in Fritz, where the purpose of the classification may fairly be inferred from the statutory terms, and the situation where the purpose of the classification cannot be objectively identified, and the Court has nothing to go on but the ingenious ability of the defending lawyer to hypothesize a legislative purpose. In Fritz, the statute expressly classified a legislative purpose. In Fritz, the statute expressly classified between railraod employees who had a current connection with a railroad and those who did not, so it was reasonable to infer that the purpose of Congress in making the classification was to prefer career railroaders, the persons for whom the Railroad Retirement Act was designed. 101 S.Ct., at 461. In some of its opinions this Court has indicated that under the "rational basis" standard, the purpose of the classification must be ex-

press or must be readily identifiable, see the review of cases in Fritz, supra, at p. 466 (Brennan, J. dissenting), and it is respectfully submitted that without such a requirement, the "rational basis" standard can in practice, indeed become "toothless" scrutiny.

It is also necessary that this Court indicate whether under the "rational basis" standard, the availability of alternative means to advance the legislative purpose other than the classification in question is relevant in the constitutional equation. In the present case, Congress sought by the enactment of the Staggers Act to reduce the costs of the program of income protection for Conrail employees and to "eliminate windfall payments." (6-A). It accomplished this objective in regard to the operating employees by imposing a "cap" based on the average 1977 earnings for each Interstate Commerce Commission classification of operating

employee. It could have accomplished the same objective in regard to the non-operating and maintenance-of-way employees by imposing a similar "cap" on their monthly displacement allowances. Whatever the sum of money that Congress wished to appropriate for employee income protection, it could have treated the three generic classes of represented employees equally, and to the extent necessary, could have reduced their monthly displacement allowances porportionally. Instead, Congress removed completely past overtime earnings and other "extras" from the monthly displacement allowances for the non-operating and maintenance-of-way employees while retaining them in the monthly displacement allowances for the operating employees. The fact that Congress could have advanced its objectives by non-discriminatory means should be relevant in an analysis of the "rationality" of the Congressional scheme that discriminated

against the disfavored groups of represented employees.

The main "rational basis" issue in the present case, however, is the matter of the Special Court's hypothesizing a legislative purpose that was different from the purpose expressly stated by Congress. If this is permissible under the "rational basis" standards, then the standard becomes meaningless, because forearmed with the knowledge that the classification cannot be sustained with reference to its express purpose, the ingenious lawyer defending the classification can always hypothesize another purpose and another putpose ad infinitum. At some point in time the lawyer will come up with an hypothesized purpose that will "rationally" support the classification. Since the hypothesized purpose was not in fact the purpose of the legislative body in making the classification, the lawyer for the assailant will be hard-pressed to show that, "the legislative facts on which the classi-

fication is (hypothethically) based could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, supra, at p. 111. Surely, this cannot be what is meant by a "rational basis" standard of review.

The petitioners have contended that this Court should grant certiorari in the present case so that it can expressly adopt as doctrine the sliding scale standard of review that, in the respectful submission of the petitioners, it has in fact been applying in equal protection cases. At a minimum, however, this Court should grant certiorari so that it can clarify the meaning of the "rational basis" standard of review and set forth definitive guidelines for its application by the lower courts.[6]

CONCLUSION

For the reasons stated herein, it is respectfully prayed that a writ of

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[6] The issues presented by the petitioners in the present case are "important questions of federal law which should be settled by this Court." Supreme

certiorari be granted to review the judgment of the Special Court.

RESPECTFULLY SUBMITTED,

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Court Rule 17. The appropriateness of the review of these issues on certiorari by this Court is not affected by the enactment of the Northeast Rail Service Act of 1981 and the future elimination of supplemental income protection for Conrail employees. Kirchberg v. Feenstra, __U.S.__, 101 S.Ct., 1195 (1981); Taylor v. Louisana, 419 U.S. 522 (1975).

APPENDIX

MEMORANDUM OPINION AND ORDER OF THE SPECIAL COURT GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed July 22, 1981

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

LESLIE R. HIND, DARLENE THOMAS, CRESCENCIO S. MIRANDA, DANIEL GAILLIARD and WILLIAM S. SMITH, Plaintiffs, vs. CONSOLIDATED RAIL CORPORATION, Defendant.	No. 81-3

Before FRIENDLY, Presiding Judge, WISDOM, Judge, and THOMSEN, Judge.

WISDOM, Judge:

In this class action five plaintiffs attach the constitutionality of §501 of the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1894 (1980) ("Staggers Act"). That section changes the method of calculating the employee income protection provided by §505 (b) of the Regional Rail Reorganization Act of 1973, P.L. 93-235, 87 Stat. 984 (1974),

45 U.S.C. §§701-794 (1976 & Supp. III 1979) ("RRR Act" or "the Act"). Each of the plaintiffs is a former employee of the Penn Central Railroad and each is now employed by Consolidated Rail Corporation (Conrail). They allege that each is a "protected employee" within the meaning of §501 of the RRR Act.[1] A protected employee who is "deprived of employment or adversely with respect to....compensation" as a result of the restructuring of the bankrupt railroads under the Act is entitled to receive from Conrail certain benefits, including "monthly displacement allowances" (MDA's) under §505 (b) of the Act. The RRR Act originally used a single formula to compute the MDA's of all protected employees. The Staggers Act amended §505(b) to divide protected employees into four categories and provides a different method for calculating the MDAs for the members of each category. The plaintiffs allege that

the deliberate effect of those amendments is to deny or substantially reduce the MDA entitlement of nonoperating employees (clerical workers, for example) and maintenance-of-way employees who continue to be employed by Conrail, while operating employees (train and engine crews) and employees not covered by a collective bargaining agreement (management) still in Conrail's employ continue to receive substantially the same guaranteed payments as before. The only issue in this case is whether this aspect of the Staggers Act discriminates between operating employees, on the one hand, and maintenance-of-way and non-operating employees, on the other, in a way so lacking in rational jurisdiction as to violate the equal protection component of the due process clause of the fifth amendment.[2/]

This court has exclusive subject

matter jurisdiction over constitutional attacks on the Act under §209(e)(1)(B) of the Act. See Consolidated Rail Corporation v. Hinds, 512 F.Supp. 1331 (Sp.Ct.R.R.R.A. 1981), enjoining the plaintiffs from prosecuting this claim in the United States District Court for the Eastern District of Michigan.

The complaint asks for injunctive and declaratory relief. After filing its answer, Conrail filed a motion for summary judgment. The United States, intervening as of right to defend the constitutionality of this federal statute, filed a similar motion. The plaintiffs then cross-filed a motion for summary judgment. The Court certified this case as a class action on the plaintiffs' unopposed motion.

We hold, and the parties agree, that there is no dispute as to any material fact. We grant the defendant's and the intervenor's motions for summary judgment; we deny the plaintiff's motion for summary

judgment. The Staggers Act establishes a rational classification system and is therefore not in violation of the fifth amendment.

I.

The threshold issue this case presents is the appropriate standard of judicial review. We conclude that when Congress enacts social welfare legislation such as the labor protection provisions of the Staggers Act, the statute in question can be held to violate the fifth amendment only if it is "patently arbitrary or irrational". United States Railroad Retirement Board v. Fritz, 66 L.Ed.2d 368, 377 (1980). "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end." Id. at 378.[3/]

This minimal rationality standard imposes a heavy burden on the challengers to the Staggers Act. In Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct.

1153, 25 L.Ed.2d 419 (1970), the Supreme Court observed:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. National Carbonic Gas Co., 220 U.S. 61,78. "The problems of government are practical ones and may justify, if they do not require, rough accomodations - illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowen v. Maryland, 366 U.S. 420, 426.

Dandridge involved a classification scheme for the award of social welfare benefits. The plaintiffs invoked the equal protection clause of the fourteenth amendment. The due process clause of the fifth amendment imposes no higher standard. Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971). Cf. Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct.

254, 30 L.Ed.2d 884 (1954).

The plaintiffs accept the minimum rationality standard as applicable to this case, but contend that "there is no rational basis for distinguishing between the three generic classes of agreement employees with respect to the basis formulae for determining their compensation guarantees or for effectively denying supplemental income for protected nonoperating and maintenance-of-way employees while retaining it for protected operating employees."[4/] Before applying the minimal rationality standard to §501 of the Staggers Act, we take a brief look at the RRR Act.

II.

In 1973 the bankruptcy of certain major railroads in the Northeast and Midwest regions of the country threatened the national welfare; seven of the railroads, including the hugh Penn Central system, were principally in the Northeast. Congress

responded with the RRR Act, an innovative program designed to replace the inefficient, costly, often duplicative insolvent lines with a new and economically viable rail system.[5/] The Act created Conrail, a private, for-profit corporation, to acquire substantial portions of the insolvents' railroad properties. Conrail now operates rail service over those properties in accordance with a "Final System Plan" drafted by United States Railway Association, a new entity established by the Act.

Title V of the Act protects those employees of the insolvent railroads whose employment was governed by a collective bargaining agreement from being "placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto..." RRR Act, §505(a). That general guarantee was implemented by several specific

benefit provisions. For example, Conrail was authorized to terminate employees with less than three years of experience. An employee so terminated, however, could go on voluntary furlough without pay or accept a lump sum based on his rate of pay and term of service. §505(f). An employee with more than three years of service who elected to resign or not to transfer to a vacancy requiring relocation was entitled to a separation allowance based upon his rate of pay, years of service, and age, subject to a maximum of $20,000. §505(e). Most importantly, protected employees involuntarily "deprived of employment or adversely affected with respect to...compensation" were entitled to an MDA. The Act authorized an MDA for all protected employees based on a single formula. According to the uniformly applicable MDA formula contained in original §505(b), an employee's MDA was determined by computing the total

compensation he received, including overtime, vacation allowances, and monthly compensation guarantees, during the twelve months preceding January 1, 1975. The employee's total time paid for during that period was also calculated. Dividing these annual totals by twelve produced the average monthly compensation and the average monthly time for which he was paid. If in any month an employee earned less in his current position than his average monthly compensation, he received an additional payment equal to the difference. If in any month an employee worked more hours in his current position than his average monthly time paid for, he received an additional payment equal to the hourly rate for his current position multiplied by the excess hours. The monthly displacement allowance was adjusted upward to reflect general wage increases in the industry. Through January 1979, there had been nine such increases for many Conrail employees.[6/]

Although the Act made Conrail responsible for the payment of all Title V benefits, Congress provided for it to be reimbursed from the Regional Rail Transporation Protective Account. § 509. Congress appropriated $250 million to finance the benefits, with the exception that that sum would cover all labor protection expenditures until the year 2021, when the last protected Conrail employee would reach retirement age. This was a monumental miscalculation. The well went dry in 1980.[7/]

Congress had expected that most of the $250 million would be used for termination and separation allowances.[8/] Instead, MDAs consumed most of the funds. On average, 13,000 employees claimed a typical MDA of $400 for a total of $5.2 million a month.[9/] Moreover, most of the MDAs went to employees working full time for Conrail.[10/]

There were several reasons for the

high MDAs. One was the use of a single MDA formula for maintenance-of-way workers, operating employees, non-operating employees, and noncontract employees, without regard to varying compensation methods differentiating these categories. Windfalls resulted from seasonal variations in work schedules, especially of maintenance-of-way workers. Because the statute did not require MDA payments to stop when combined earnings and MDA payments equalled twelve times the employee's 1974 average monthly compensation, many Conrail employees received total annual compensation in excess of their 1974 earnings. The use of 1974 as a base year resulted in windfalls because that year had an unusual amount of overtime and high earnings.[11/]

Year by year it became increasingly apparent that Conrail could not survive

unless drastic measures were taken to reduce the MDAs. Witnesses at a Senate hearing estimated that continuation of the original formula for calculating MDAs would require an additional appropriation of $736 million to $1.7 billion.[12/]

Congress met this crisis by amending Title V in the Staggers Act. The objectives of the Staggers Act were to concerve scarce government resources and to eliminate inequities and windfalls, principally by using separate MDA formulae tailored to the differing compensation schemes of the major groups of railroad employees.[13/] The Senate Report on S.2530, the original bill containing the Title V amendments, contains the statement:

> The purpose of...this legislation is to improve the labor protection program that now provides benefits to the former employees of the Northeast

> and Midwest bankrupt railroads by reducing the opportunity for protected employees to receive excessive compensation guarantees...

Senate Report at 1. Congress appropriated a modest $235 million to finance the Title V amendments.

The figures showing the effect of adoption of the Staggers Act are impressive. A comparison of the MDAs paid in September and October, 1980, the last month under the old regime and the first of the new, shows that substantial savings immediately resulted:[14/]

	Sept.	Oct.
Maintenance-of-way	$ 661,000	$ 121,000
Nonoperating	2,653,000	1,108,000
Operating	3,423,000	1,219,000
Noncontract	55,000	48,000
Total	$6,792,000	$2,496,000

The partial claims, that is, MDAs paid to employees actively working for Conrail, were as follows:[15/]

	Sept.	Oct.
Maintenance-of-way	$ 489,000	$ 10,000
Nonoperating	1,626,000	100,000
Operating	2,485,000	648,000
Noncontract	9,000	9,000
Total	$4,609,000	$767,000

III.

A. Effect of the Staggers Amendments

1. Maintenance-of-Way employees

Maintenance-of-way employees are affected in two ways by §501 of the Staggers Act. The first relates to the problem of seasonality. Maintenance-of-way employees are engaged in the repair of railroad facilities. Because they work outside, they work longer hours in the summer months, when weather conditions are favorable, than in the winter months. This difference in seasonal employment led to windfalls under the 1973 MDA calculation. Under the original RRR Act, MDA was calculated over a twelve month period. The allowance would be paid whenever the actual monthly compensation was less than

the average monthly compensation. But there was no countervailing or offsetting adjustment in the formula for busy months during which a maintenance-of-way employee would earn more than his average monthly compensation.[16/] A maintenance-of-way employee therefore, could have an annual income in excess of his annual compensation guarantee (i.e., his average monthly compensation multiplied by twelve), yet nevertheless receive MDAs. Indeed, a maintenance-of-way employee who worked the same schedule in 1979 as in 1974, and thus suffered no displacement, could receive significant MDA's under the 1973 formula. This anomaly was noted by Congress and extensively illustrated in the Senate Report on S.2530.[17/]

The Staggers Act overcomes the seasonality problem by annualizing the MDAs for maintenance-of-way workers. Under new § 505(b)(2), a maintenance-of-way

employee is paid only 80 percent of the difference between his actual monthly straight-time earnings and his "average monthly compensation" as a monthly displacement allowance. The employee is paid for any shortfall between his compensation guarantee and his actual earnings through a yearend adjustment. Alternatively, if the sum of his monthly displacement allowances exceeds his annualized compensation guarantee, that amount is offset against future Title V benefits.

Second, the Staggers Act eliminates 1974 overtime compensation from the maintenance-of-way compensation base. The maintenance-of-way employee's total 1974 compensation is divided by the total time paid for during that period, yielding a straight-time hourly rate. This figure is multiplied by 174, the average number of work hours in a month, to produce

"average monthly compensation". §505(b)(2) (as amended).

The principal impact of the amendments has been on those maintenance-of-way employees who are still employed by Conrail. The number of claims by workers actively employed by Conrail fell from 1138 in September to 14 in October; the cost fell from $489,000 to $10,000. By contrast, the totally displaced employees were relatively unaffected. The number of their claims fell from 100 to 93; the cost fell from $172,000 to $141,000.

2. Nonoperating employees.

Nonoperating employees generally work straight-time schedules, with little seasonal variation.[18/] In 1974, the base year for the original MDA computation, many nonoperating employees had worked an unusually large amount of overtime, in part as a result of hiring freezes instituted by predecessor railroads and in part because

of unusually heavy clerical work undertaken in preparation for reorganization.[19/] Thus, the 1974 earnings of many nonoperating employees were unrepresentative of their pre-consolidation earnings.

The Staggers Act amendments eliminate that anomaly by guaranteeing each nonoperating employee only his straight-time rate for the position he held on September 1, 1979, or if he was not employed on that date, the rate for his prior position. §505(b)(1)(A). He is guaranteed that hourly rate for the current full-time work schedule, §505(b)(1)(C); if he fails to earn that amount, he receives an MDA.

The new formulation reduced MDA's payable to nonoperating employees by $1,545,000 between September and October 1980. This reduction again had its greatest impact on those employees who were receiving MDA's while still actively

working for and being compensated by Conrail. The claims submitted by such employees fell from 4862 to 386; the costs fell from $1,626,000 to $100,000. The impact was slight on fully displaced employees who received no compensation from Conrail. Their claims fell from 597 to 577; costs fell from $1,027,000 to $1,008,000.

3. Operating employees.

Maintenance-of-way employees and nonoperating employees are paid primarily on an hourly basis. Unlike those classes of railroad employees, operating employees are paid on the basis of a complex system developed over many years,going back to the early 20th century and World War I, and incorporated into most collective bargaining agreements today.

The standard of payment for operating employees in road freight service

is the "dual basis of pay" rule; 100 miles or less or 8 hours of work or less constitutes a day's work. Miles in excess of 100 miles are paid for at specified mileage rate. On runs of 100 miles or less, overtime begins after 8 hours. On runs of more than 100 miles, overtime begins when the time on duty exceeds the miles run divided by 12 1/2. A full day's pay is earned for each run of 100 miles, regardless of the number of hours required to make the trip. Overmiles are paid on runs over 100 miles without regard to the time taken to make the trip.

Train and engine service employees also receive "constructive allowances" or "arbitraries" under most collective bargaining agreements. These are flat payments for specific activities, such as coupling air hoses connecting cars, or for particular hardships, such as enduring delays in the scheduled start or arrival

time of a train, working through lunch, reporting for duty at other than the normal point, and switching cars at certain locations. In 1977, arbitraries amounted to 26.3 percent of the total compensation earned by Conrail road freight employees and 16.7 percent of the pay for yard and engine employees.[20/]

Overtime pay and arbitraries for operating employees, unlike the other classes, was regarded by Congress in 1980 as customary part of their compensation.[21/] Congress therefore retained overtime pay, overmileage, and arbitraries in the 1974 base used to calculate MDAs for operating employees. Congress instead placed a "cap" or ceiling on their guaranteed compensation. Under new §505 (b)(3), the 1977 average compensation among Conrail employees in each Interstate Commerce Commission operating classification is calculated. This

average is the maximum income guarantee, and any operating employee with a higher monthly displacement allowance guarantee has it reduced to reflect this average. Furthermore, because excessive MDAs for operating employees were in part due to seasonal changes in workload, new §505(b)(3) contains an annual adjustment provision similar to that applicable to maintenance-of-way employees, whereby operating employees are initially paid only 75 percent of the difference between their monthly guarantee and actual compensation, with additional payments, or credits against future benefits, determined at year's end.

The Staggers Amendments substantially reduced the MDA's payable to operating employees, declining from $3,423,000 to $1,219,000 between September and October 1980. The number of partial claims fell from 4,017 in September to 1,793 in

October 1980; payments fell from $2,485,000 to $648,000. As with the other categories of protected workers, the impact on fully displaced employees was less severe: claims fell from 466 to 408 in number; costs fell from $938,000 to $571,000 in amount.

4. Noncontract employees.

Noncontract employees receive annual salareis, do not have problems related to seasonal activity, and do not receive overtime.[22/] Accordingly, the Staggers Act does not amend the Title V MDA formula applicable to noncontract employees. These employees are much less adequately protected from the effects of displacement. The General Accounting Office found in its analysis of Title V that the method for calculating monthly displacement allowances discriminated against nonagreement employees in favor of unionized employees.[23/] All three

classes of unionized employees have their compensation guarantees upgraded by periodic negotiated pay increases, which qualified as "general wage increase[s]" under §505(b)(1)(C) of the original RRR Act; operating and maintenance-of-way employees ratain that advantage under the Staggers Act. §§505(b)(2), 505(b)(3) (as amended). Conrail's noncontract employees generally received "merit" increases, not considered "general wage increases" and therefore not reflected in their Title V benefit guarantees.[24/] In retaining the original monthly displacement allowance formula for noncontract employees, Congress in effect ratified the de facto reduction in their benefits which had occurred during the inflationary four years of the program.

B. Analysis

The plaintiffs accept the fact

that Congress was not constitutionally required to provide income protection for "adversely affected" Conrail employees. But, they contend, once Congress chose to provide it, the "equality value" in the fifth amendment required that Congress treat equally the three generic classes of agreement employees. The argue that the three classes are similarly situated as to need and statutorily-defined entitlement to supplemental income protection, and that there is no independent justification for using a different formula for operating employees from that used for the two other classes of employees. They concentrate their attach on the fact that the Staggers Act counts overtime and arbitraries in the base-year earnings of operating employees, but uses only straight-time earnings for non-operating and maintenance-of-way

employees.

We disagree. Congress carefully considered the Staggers Act,[25/] and the relevant committee reports specifically found that the dissimilarities in the ways the four categories of employees are usually compensated made it appropriate to treat each class differently.[26] The legislative history reveals no strong effort on the part of railroad unions to oppose the Staggers Act as discriminatory. Indeed, the only testimony in opposition came from one of the plaintiffs in this case, Mr. Hinds, at a Senate hearing; the committee specifically considered and rejected much the same argument as he advances here in constitutional guise.[27/] Cf. United States Railroad Retirement Board v. Fritz, 66 L.Ed.2d 368, 379 (1980).

First, we reject the plaintiffs'

attempt to exclude noncontract employees from the analysis. The RRR Act is a whole and must be viewed as a whole. The fact that the Act, as amended, places non-contract employees in a less favorable position with respect to MDAs than the two allegedly aggrieved classes tends to negate their claim.

More significantly, we hold that the plaintiffs' attempt to confine the debate to the issue of overtime and arbitraries is not persuasive because it ignores the numerous other factors that go into MDA computations under the Staggers Act. For example, unlike maintenance-of-way and operating employees, a nonoperating employee's guaranteed rate is increased with a move to a higher-rated position, and he maintains that higher rate even if he later moves to a lower-rated position. §505(b)(1)(B) and (D) (as amended).

Maintenance-of-way and operating employees are subject to seasonal adjustment provisions; nonoperating employees are not. Neither maintenance-of-way nor nonoperating employees are subject to a cap provision similar to the one applicable to operating employees.

When the effect of these diverse restrictions is aggregated, the result is highly rational. The reductions in MDAs were spread among all four classes of employees, and the net effect of the amendments, as measured by the change in each class' share of the total MDAs paid before and after their enactment, is not large; the maintenance-of-way employees' share declined from 12.1 percent to 11.0 percent; the nonoperating employees' share declined from 45.8 percent to 35.9 percent; the operating employees' share increased from 39.4 percent to 51.2 percent; and the noncontract employees' share declined from

2.8 percent to 1.9 percent.[28/] As noted above, within each class of employees the impact of the Staggers Act falls by far most heavily on those who least needed MDAs - that is, those employees who continue to work for Conrail.

Even on the plaintiffs' own terms, examining the inclusion of overtime and arbitraries in the base-year earnings of operating employees in isolation, the statute passes muster. The Senate Report on what became the Staggers Act justified this disparate treatment on the ground that the wage structure of operating employees is based on "complex formulae . . . totally different from that of all other railroad employees" (a reference to the dual basis of pay rule), and that under those formulae "overtime and arbitrary payments should be considered a basic

part of the wage structure for operating employees..."[29/] The plaintiffs offer two arguments to the contrary, but neither is sufficient.

First, they note that overtime and arbitraries are not part of the basic wage structure for operating employees in the sense that management is not obligated to provide either; that is, whether a given operating employee gets overtime or overmileage depends on whether his railroad schedules its operations so as to trigger his entitlement under the dual basis of pay rule, just as a given nonoperating employee will receive overtime if the railroad chooses to schedule him for more than an eight hour day. This proves nothing, because Congress could reasonably have assumed that operating employees generally receive a larger proportion of their compensation in the form of extras

than do other classes of employees. Overtime and arbitraries amounted to nearly a third of the total compensation paid to Conrail's operating employees in each of the years 1976 through 1980, for example.[30/] The plaintiffs made no showing that non-operating or maintenance-of-way employees as a class systematically receive so large a proportion of their compensation in the form of overtime or other extras.[31/]

Second, the plaintiffs note that the dual basis of pay rule applies to operating employees only while they are in road freight service, and offer an affidavit stating that at most 35 percent of Conrail's operating employees are engaged in road service at any one time. They therefore argue that Congress' decision to include all overtime and extras in the operating employees' MDA base was irrational because it was based on a misapprehension that their compensation was

always based on the dual basis of pay rule. We think these facts prove precisely the opposite point. If every operating employee spends as much as 35 percent of his time on the road, and if overtime and arbitraries constitute a significant amount of their compensation while on the road, Congress is certainly entitled to take that fact into account when computing their expected pay. True, Congress could have chosen to take overtime and arbitraries into their MDA basis only if earned in raod service. But in social welfare legislation, Congress is enttiled to paint with an overbroad brush so long as each brushstroke is rationally motivated. Dandridge v. Williams, 397 U.S. 471, 485 (1970). Because Congress could reasonably have assumed that operating employees earn a larger proportion of their compensation through extras, the distinction here is rational.

We have considered the plaintiffs' other arguments and find them to without merit. The motion of the plaintiffs for a summary judgment is denied. The motions of the defendants and the intervenor for a summary judgment is granted.

/s/
HENRY J. FRIENDLY
Presiding Judge

/s/
JOHN MINOR WISDOM
Judge

/s/
ROSZEL C. THOMSEN
Judge

July 22, 1981

FOOTNOTES

1/ With respect to Conrail, a protected employee is any person, other than a corporate officer, who was employed by one of Conrail's predecessor bankrupt railroads as of January 2, 1974 and who had not reached age 65. RRR Act, § 501(3).

2/ The plaintiffs' constitutional contentions are narrower in their brief than in their complaint in several respects. The brief claims unconstitutional discrimination only with respect to "supplemental income protection" or "partial claims" - that is, MDAs due protected employees who continue to be employed by Conrail. Brief at 1-2. Second, the complain alleges that Title V was enacted as a quid pro quo for contractual rights purportedly wavied in the transactions that created Conrail. Because noncontract employees purportedly were treated more favorably than nonoperating and maintenance-

of-way employees, who were protected by collective bargaining agreements, the complaint argues that Congress acted irrationally. But the plaintiffs withdrew that theory in their brief, at 1 n.1. Moreover, nothing in the legislative history shows that either in 1973 or in 1980 Congress intended Title V to compensate the bankrupts' employees for contractual rights forfeited when Conrail was created. On the contrary, it was clearly perceived as a social welfare program designed to secure a spell of labor peace for the fledgling Conrail and political support for the consolidation. See S. Rep. No. 96-784, 96th Cong., 2d Sess 3 (1980) ("Senate Report"); 119 Cong. Rec. H 9739-40 (Nov. 8, 1973) (remarks of Rep. Skubitz); id. at H 9762 (remarks of Rep. Staggers). Finally, the complaint alleges that the classification adopted by the Staggers amendments was intended to discriminate against blacks,

Hispanics, and women. Plaintiffs' counsel stated at oral argument that he would not pursue that allegation. Moreover, since the uncontested facts show that while males constitute 75 percent or more of each class of employees, that theory would fail in any case. See Personnel Administrator v. Feeney, 442, U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870(1979).

3/ MDAs are social welfare benefits analogous to railroad retirement or social security benefits. There is no question of an uncompensated taking of property. Railroad Retirement Board v. Fritz, 66 L.Ed.2d 368, 375 (1980). The Supreme Court has consistently used minimal rationality as the appropriate standard for equal protection review in social welfare cases. See, e.g. id. (elimination of duplicative federal railroad retirement and social security benefits for certain classes of railroad workers);

Califano v. Jobst, 434, U.S. 47, 98 S.Ct. 95, 54 L.Ed 2d 228 (1977) (federal statute terminating disabled recipient); Mathews v. DeCastro, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) (federal statute denying social security surviving spouse benefits to divorced spouse under age 62); Weinberger v. Salfi, 422, U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975) (federal duration-of-relationship requirement for receipt of surviving spouse and child social security benefits); Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285(1972)(state program paying lower percentage of estimated need for aid for dependent children than for aid to other assistance classifications); Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971) (federal statute reducing social security benefits to reflect worker's

compensation payments).

4/ Plaintiff's Brief at 3.

5/ See In re Penn Central Transportation Co., 334 F.Supp 895, 902-11 (Sp. Ct. R.R.R.A. 1974); Regional Rail Reorganization Cases, 419 U.S. 102, 108-17, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). See generally S. Rep. No. 93-601, 93d Cong. 1st Sess. (1973), reprinted in [1973] U.S. Code Cong. & Ad. News 3242.

6/ Comptroller General of the United States, Employee Protection Provisions of the Rail Act Need Change 3 (1979) (CED-80-16)("Comptroller General's Report").

7/ H.R.Rep. No. 96-1035, 96th Cong. 2d Sess. 44-45 (1980), reprinted [1980] U.S. Code Cong. & Ad. News 3978 ("House Report").

8/ USRA - Nomination; Authorization; Conrail Plant Rationalization; and Employee Protection Program; Hearings on S. 2527 and 2530 Before the Subcomm. on Surface

Transportation of the Senate Comm. on Commerce, Science and Transportation, 96th Cong. 2d Sess. 119(1980) ("Senate Hearing") (statement of Herbert P. McLure, Associate Director, Community and Economic Development Division, GAO).

9/ Title V Authorization Under the Regional Rail Reorganization Act of 1973: Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 96th Cong. 2nd Sess. 2 (1980) ("House Hearing") (statement of Ray James, Chief Counsel, Federal Railway Administration).

10/ Comptroller General's Report, supra note 6, at 8; House Hearing, supra note 9, at 8 (statement of John L. Sweeney, senior vice president, Conrail).

11/ Senate Report, supra note 2, at 5. One member of the clerks' union who earned $16,000 in one year working for Conrail was paid an additional $20,000 in MDAs. House

Hearing, supra note 9, at 17 (statement of John L. Sweeney). More than 40% of the workers received combined earnings and MDAs in excess of their annual guarantees. Comptroller General's Report, supra note 6, at 31.

12/ House Hearing, supra note 9, at 1, 2 (Rep. Florio; statement of Ray James).

13/ H.R. Rep. No. 96-1430, 96th Cong. 2nd Sess. 131-32 (1980), reprinted in [1980] U.S. Code Cong. & Ad. News 4110 ("Conference Report").

14/ Conrail's Appendix I, Exhibits B, C,D,E, (tentative figures).

15/ Id.

16/ There was another way in which the seasonality of maintenance-of-way work could lead to excessive compensation guarantees under the original formula. Section 505(b)(1) calculated average monthly compensation based on 12 months of earnings prior to January 1, 1975. However,

this 12 month period did not necessarily correspond to calendar year 1974. Under the 50 percent rule, any month in which an employee worked less than 50 percent of his normal work schedule was eliminated from this base period, and an earlier month was substituted. Since some maintenance-of-way employees were inactive in the winter months, those months could be eliminated from their base periods. Effectively then, a maintenance-of-way employee's base period could include 12 busy months in 1974 and 1973, rather than reflecting his actual cyclincal earnings pattern during 1974. This resulted in excessive benefits for maintenance-of-way employees. The Staggers Act eliminates the 50 percent rule for maintenance-of-way employees. §505(b)(2)(as amended).

17/ Senate Report, supra note 2, at 7-8.

18/ Id. at 6.

19/ House Hearings, supra, note 9, at 19 (statement of John L. Sweeney, senior vice

president, Conrail).

20/ Comptroller General of the United States, Conrail's Attempt to Control Labor Costs and Improve Its Labor Productivity 13-19 (1980).

21/ Senate Report, supra note 2, at 6, 8-9.

22/ Conference Report, supra note 13, at 130; Senate Report, supra note 2, at 24.

23/ Comptroller General's Report, supra note 6, at 36-39.

24/ House Hearings, supra note 9, at 13 (statement of John L. Sweeney, senior vice president, Conrail).

25/ The House of Representatives conducted public hearings on the need for modifications in Title V. House Hearing, supra note 9. Two bills which would amend Title V were introduced in the House of Representatives. H.R. 7110, 96th Cong. 2d Sess. (1980); H.R. 7235, 96th Cong. 2d Sess. (1980).

H. R. 7235 was reported from committee with extensive comment on the Title V amendments, House Report, supra note 7, at 44-50, and enacted by the House on September 9, 1980. 126 Cong. Rec. H. 8608 (Sept. 9, 1980).

The Senate also conducted public hearings on the issue of Title V modifications. Senate Hearing, supra note 8. A separate bill dealing primarily with Title V amendments, S 2530, 96th Cong., 2d Sess. (1980), was reported from committee with an extensive analysis, Senate Report, supra note 2, and enacted on June 28, 1980. 126 Cong. Rec. S 8824 (June 28, 1980).

H. R. 7235 dealt with railroad deregulation as well as Title V modifications. In contrast, the Senate had enacted S. 2530, the bill dealing with Title V, and S. 1946, 96th Cong. 2d Sess. (1980), a separate piece of railroad deregulation legislation. The three bills went to conference, and a combined

deregulation and Title V modification bill, the Staggers Rail Act, was reported. Conference Report, supra note 13. The Staggers Rail Act was enacted by both chambers of Congress on September 30, 1980. 126 Cong. Rec. S. 14012, H. 10087 (Sept. 30, 1980).

26/ Senate Report, supra note 2, at 6-9; House Report, supra note 7, at 74-75; Conference Report, supra note 13, at 129-32.

27/ Senate Hearings, supra note 8, at 100; Senate Report, supra note 2, at 6-7.

28/ Conrail's Appendix I, Exhibit F.

29/ Senate Report, supra, note 2, at 8-9.

30/ Conrail's wage statistics report to the ICC for those years pertaining to train and engine service employees show:

Year	Straight Time Paid	Overtime Paid
1976	320,894	57,412
1977	435,781	80,405
1978	463,704	90,838
1979	478,755	93,974
1980	483,957	70,016

Year	Arbitraries Paid	Total	Percent
1976	93,549	471,855	32.0%
1977	125,676	641,862	32.1%
1978	129,695	684,037	32.2%
1979	142,936	715,665	33.1%
1980	134,708	688,681	29.7%

All figures are in thousands of dollars. The figures for 1976 are for April through December. "Arbitraries Paid" includes all constructive allowances, vacations and holidays. "Percent" is "Overtime Paid" plus "Arbitraries Paid" as a percentage of "Total". See Conrail's Appendix VI.

31/ The plaintiffs presented several affidavits by employees other than operating employees who work overtime frequently, but this is far from sufficient to who that such employees as a class receive as much of their total compensation in the form of overtime and extras as do operating employees.

ORDER OF THE SPECIAL COURT GRANTING MOTION OF UNITED STATES TO INTERVENE

Filed 7/9/81

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

LESLIE R. HINDS, et al,	)	
	)	
Plaintiffs	)	
vs.	)	NO. 81-3
	)	
CONSOLIDATED RAIL CORPORATION,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING MOTION OF UNITED STATES TO INTERVENE

Upon consideration of a motion by the United Staes of America to intervene as a party defendant in the above-captioned matter, it is

ORDERED that the United States of America be and hereby is granted leave to

intervene as a party defendant.

/s/
HENRY J. FRIENDLY
Presiding Judge

/s/
JOHN MINOR WISDOM
Judge

/s/
ROSZEL C. THOMSEN
Judge

Dated: July 8, 1981

ORDER OF THE SPECIAL COURT DENYING PLAINTIFFS' PETITION FOR RECONSIDERATION

Filed September 2, 1981

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

LESLIE R. HINDS, DARLENE THOMAS, CRESCENCIO S. MIRANDA, DANILE GAILLIARD, and WILLIAM S. SMITH, Plaintiffs,	
vs.	NO: 81-3
CONSOLIDATED RAIL CORPORATION, Defendants.	

ORDER DENYING PLAINTIFFS' PETITION FOR RECONSIDERATION

Upon consideration that on August 3, 1981, plaintiffs filed, in accordance with Rule 20 of the Rules of the Special Court, a Petition for Reconsideration of this Court's judgment of July 22, 1981, granting the motions of defendant, Consoliated Rail Corporation, and intervenor, United States of America for summary judgment, and denying the motion of plaintiffs'

for summary judgment,

IT IS ORDERED that plaintiff's Petition for Reconsideration be, and it is, hereby denied.

/s/
HENRY S. FRIENDLY
Presiding Judge

/s/
JOHN MINOR WISDOM
Judge

/s/
ROSZEL C. THOMSEN
Judge

Dated: September 2, 1981

51-A

CLASS ACTION ORDER OF THE SPECIAL COURT

Filed July 9, 1981

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

LESLIE R. HINDS, et al, Plaintiffs, vs. CONSOLIDATED RAIL CORPORATION, Defendant.	NO: 81-3

ORDER

Upon consideration of Plaintiffs' Motion for Certification of Case as Class Action and Deisgnation of the Class and the Class Representatives, and the Court being advised in the premises, it is hereby ORDERED:

1. The above-entitled case is certified as a class action.

2. The class shall consist of all non-operating and maintenance-of-way employees of the Consolidated Rail Corporation, as classified pursuant to §501(b) (1) (A) and §501(b)(2) of the Staggers Rail Act of 1980 respectively, who are protected employees within the meaning of §501(b) of the Staggers Rail Act of 1980.

3. The plaintiffs in the above-entitled case, Leslie R. Hinds, Darlene Thomas, Crescencio S. Miranda, Daniel Gailliard and William S. Smith, and each of them, are designated as representatives of the class.

Entered this 8th day of June, 1981.

/s/
HENRY J. FRIENDLY
Presiding Judge

/s/
JOHN MINOR
Judge

/s/
ROSZEL C. THOMSEN
Judge

MEMORANDUM OPINION AND ORDER OF THE SPECIAL COURT ENJOINING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Filed May 1, 1981

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION, Plaintiff, UNITED STATES OF AMERICA, Plaintiff-Intervenor vs. LESLIE R. HINDS, et al, Defendants.	NO: 81-2

FRIENDLY, Presiding Judge:

This is an action filed on March 16, 1981, by Consolidated Rail Corporation (Conrail) against Leslie R. Hinds and four other defendants (sometimes referred to hereafter as the Michigan action plaintiffs). The latter, four of whom are residents of Michigan, have brought an action

against Conrail in the District Court for the Eastern District of Michigan, Civil No. 81-70591 (hereafter the Michigan action). All the Michigan action plaintiffs allege that they were former employees of the Penn Central Railroad; that they were members of unions having collective bargaining agreements with Penn Central which provided certain income protection; that after April 1, 1976, they became employees of Conrail; that each was a "protected employee", as defined in §501(3) of the Regional Rail Reorganization Act of 1973, as amended, and was entitled to the protection afforded by §505, particularly the monthly displacement allowance provided by §505(b); and that they are now classified as nonoperating employees (one of them being a maintenance-of-way employee) pursuant to the amendment of §505(b) effected by §501 of the Staggers Rail Act of 1980, 94 Stat. 1895, 1948.

The Michigan action plaintiffs sought to sue on behalf of themselves and all others similarly situated.

The gravamen of the complaint in the Michigan action is this: Section 505 of the Regional Rail Reorganization Act began by providing in subsection (a) that a protected employee whose employment was governed by a collective bargaining agreement could not, except as explicityly provided, be placed in a worse position with respect to compensation, fringe benefits, rules, etc. The chief means of accomplishing this for protected employees who continued to be employed by Conrail was §505(b) which, in effect, provided that any such employee who was adversely affected as a result of changes brought about by the operation of Conrail would receive a "monthly displacement allowance" (MDA). Broadly speaking this equalled the difference between the employee's new compensation and

what he had received during the 12 months preceding February 26, 1975, adjusted to reflect subsequent general wage increases. Conrail was to be responsible for the payment of the MDAs and other allowances, and Congress appropriated $250,000,000 to a special Regional Rail Transportation account to that end, §509. This was expected to provide for all expenditures until the year 2021, when the last eligible Conrail employee would retire. Instead, because of the small proportion of protected employees who accepted the alternative lump sum separation allowance of $20,000 provided in §505(e), the $250,000,000 fund was exhausted by 1980. Some 13,000 employees were claiming MDAs and Conrail was spending $5,200,000 a month in satisfaction of such claims. Conrail together with the Federal Railroad Administration sought a new appropriation together with an amendment to the existing method of calculating the MDA. Whereas this had

previously been computed on a uniform basis for all employees, the amendment provided different bases for the four generic classes of railroad employees, to wit, management employees, operating employees, nonoperating employees and maintenance-of-way employees. The formula for management employees was left unchanged; although the formula for operating employees was slightly changed, the complaint in the Michigan action alleges that the adverse effect would not be significant. However, for the maintenance-of-way and nonoperating employees, overtime was to be eliminated from the determination of the protected level of compensation. The Staggers Act also changed the base period for the calculation of benefits to the 12 months preceding January 1, 1975 for maintenance-of-way employees and to the 12 months preceding September 1, 1979 for nonoperating employees. Allegedly it was

represented to Congress that these changes would practically eliminate MDAs to protected non-operating and maintenance-of-way employees, and the appropriation was estimated on that basis. The Staggers Rail Act of 1980 adopted these recommendations.

The complaint in the Michigan action alleged that since the effective date of the Act -- in this intance October 1, 1980, see §710(a), the level of MDAs paid to management and operating employees has remained virtually unchanged, whereas few, if any nonoperating or maintenance-of-way employees have been entitled to MDAs. The complaint alleged that this reclassification is "patently arbitrary and irrational and deprives the non-operating employees and the maintenance-of-way employees of the equal protection of the laws guaranteed by the Fifth Amendment's Due Process Clause." The prayer for relief sought a declaratory judgment of unconstitutionality of the

classification of protected employees made by the Staggers Rail Act of 1980, a mandatory injunction requiring Conrail "to administer the program of income protection for CONRAIL employees, ... in accordance with the requirements of the Constitution of the United States"; an order directing Conrail to present a plan whereby all protected employees would be treated on an equal basis but subject to a reduction of 25%, representing the difference between the aggregate appropriation for employee income protection made by the Staggers Act as against the Act prior to amendment; a provision whereby upon the presentation of the plan and its approval by the court, Conrail should recompute the amounts by which each protected employee would have been entitled had the plan been in effect as of October 1, 1980, and make payments accordingly; and a preliminary injunction requiring Conrail to make payments of MDAa as provided

in the prior law without regard to the provisions of the Staggers Act pending decision of this case.

Conrail's complaint in this court does not deal with the merits of the Michigan action. Rather Conrail's case is that the Michigan action was brought in the wrong court. It relies on §209(e)(1) of the Regional Rail Reorganization Act, which provides, in pertinent part:

> (e) ORIGINAL AND EXCLUSIVE JURISDICTION -- (1) Notwithstanding any other provision of law, any civil action --
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> * * *
>
> (B) challenging the constitutionality of this Act or any provision thereof;
>
> * * *
>
> shall be within the original and exclusive jurisdiction of the special court.

The complaint requests us to issue a preliminary and permanent injunction. We set a briefing schedule designed to lead up to oral argument on April 28, 1981.

Meanwhile Judge Gilmore, in the Eastern District of Michigan, has courteously deferred proceedings in the Michigan action.

On March 24, 1981, the Michigan action plaintiffs filed a motion to dismiss this action for want of jurisdiction and a supporting memorandum. Conrail responded with an opposing memorandum and a motion for a preliminary injunction, to both of which the Michigan action plaintiffs replied. On April 15, 1981, the United States moved for leave to intervene as a plaintiff pursuant to F.R. Civ. P. 24(b). It also moved for a preliminary injunction and for summary judgment granting a permanent injunction. At the hearing on April 28, 1981, we granted the motion of the United States for leave to intervene and advised the parties that since the question presented was solely one of law, we were ordering the

trial of the action on the merits to be advanced and consolidated with the hearing on the application for a temporary injunction, F.R. Civ. P. 65(a)(2).

The provision of the Staggers Rail Act of 1980 which plaintiffs assert to be unconstitutional was couched as an amendment to §505(b) of the Regional Rail Reorganization Act and the new language thus constitutes a "provision" of the Act. The Michigan action is thus within the letter of §209(e)(1)(b) vesting exclusive jurisdiction in this court. The Supreme Court has repeatedly emphasized that courts are bound to look first to the language of the statute, see, e.g., Browder v. United States, 312 U.S. 335, 338 (1941); United States v. Kahn, 415 U.S. 143, 151 (1974, and when the language is as clear as here to apply it unless doing so would reach an absurd result or unless the structure and underlying purpose of the

statute or the legislative history strongly indicate otherwise, see, e.g., United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940); United States v. Key, 397 U.S. 322, 324-25 (1970); United States v. Rutherford, 422 U.S. 544, 552 (1979).

One hardly needs to go beyond mere statement to conclude that concentrating the initial decision of constitutional attacks on the Act in this court produces no absurd result, as a literal reading would have done in, say Church of the Holy Trinity vs. United States, 143 U.S. 457 (1892), or, to take a more recent example, J.C. Penney Co. vs. C.I.R. 312 F.2d 65 (2 Cir. 1962). While we agree with the Michigan action plaintiff that a judge of the District Court for the Eastern District of Michigan is entirely competent to make the initial

determination of the constitutionality of the amendment to §505(b) effected by the Staggers Rail Act, he is no more competent than this court of three judges.[1] Indeed, in the 39 years from August 1937, 50 Stat. 751, until August, 1976, 90 Stat. 1119, a date subsequent to enactment of the amendment to §209(e) with which we are here concerned, 28 U.S.C. §2282 would have required a court of three judges in any action to declare a Congressional statute unconstitutional. Further, if either a district court or this Court should declare a part of the Rail Act unconstitutional, direct appeal would lie to the Supreme Court, 28 U.S.C. §719 (e)(3), Rail Act, §209(e)(3). If a district court should reject a constitutional challenge, appeal as of right would lie to the appropriate court of appeals, 28 U.S.C. §§1291 and 1292(a)(1), and its decision would then

be reviewable by the Supreme Court on certiorari, 28 U.S.C. §1254; if we should sustain the constitutionality of a challenged provision, our decision is immediately subject to Supreme Court review on certiorari, Rail Act, §209 (e)(3). The omission of a layer of appellate review in these circumstances scarcely renders concentration of initial jurisdiction in this Court absurd; indeed it promotes speedy disposition of the controversy.

We likewise perceive no inconsistency between reading §209(e)(1)(B) to mean what it plainly says and the purposes and structure of the Rail Act. It may be,

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[1] In fact this court has been required to familiarize itself with the labor protection provisions of the Act in connection with arguments being made with respect to the position of the railroads that in the absence of the Act they could have sold large portions of the conveyed lines for continued rail use.

as the Michigan action plaintiffs contend, that the prime reason for vesting this court with exclusive jurisdiction over constitutional challenges to the Act was to prevent delay in consummation of the Final System Play (FSP). That, however, does not create the inconsistency needed to reject the plain meaning of the words Congress used. This Court can now discharge the duty imposed by §209(e)(1)(B), five years after consummation of the FSP, as effectively as it could have done before -- much as the members of the Court may wish that they were relieved of this added burden. Insofar as the Michigan action plaintiffs suggest that a literal reading of §209(e)(1)(B) might require this Court to be kept in perpetual existence, the obvious answer is that when our other tasks have been completed or so nearly completed that Congress no longer perceives us as serving a useful purpose, it can then provide as it wishes with

respect to future challenges to the consitutionality of provisions of the Act.

The references to legislative history by the Michigan action plaintiffs are equally unpersuasive. It is true that, as stated in Consolidated Rail Corp. vs. Illinois, 423 F. Supp. 941, 949 (Sp. Ct. 1976), in conference certain subsections of §209(e) appearing in the House and Senate bills were "pruned by adding the requirement ...that the suit be one challenging some action of the United States Railway Association, or seeking relief against USRA, rather than, for example, against ConRail, an interested solvent transferee, or a 'financially responsbile person' ". However, no change was made in the portion of the Senate Bill which added §209(e)(1)(B) granting this court exclusive jurisdiction over any action "challenging the constitutionality of this Act or any provision thereof", see Report of Senate

Committee on Commerce on S. 2718, No. 94-499, 94th Cong., 1st Sess. (1975) at 260, and the bill as enacted went beyond the nearest coutnerpart in the House bill which was limited to an action "for a declaratory judgment of the unconstitutionality of any part of this Act." See Report of the Committee on Interstate and Foreign Commerce on H.R. 10979, H.R. Rep. No. 94-725, 94th Cong., 1st Sess. (1975) at 40. The provisions on exclusive jurisdiction of the House bill that were eliminated as "of no concern of the central functions of the special court under the Rail Act of 1973, as amended, Report of the Committee of Conference on S. 2718, H.R. Rep. No. 94-781, 94th Cong., 2d Sess. (1976) at 188," related, in the main, to challenges reagarding specific pieces of property. It would be hard to say that Congress did not regard as "central" a subject which it thought worthy of singling out as a separate subsection of §209(e)(1).

Rather, as Judge Wisdom said in Consolidated Rail Corp. v. Illinois, supra, 423 F.Supp. at 949, "The limitations on exclusive jurisdiction imposed in Conference express Congress's view of the Special Court's 'central function' ". Indeed, as the United States urges, if Congress meant our exclusive jurisdiction to be limited to challenges that would interfere with implementation of theFSP, the matter would have been adequately covered by §209(e)(1)(A) and (C), and there would have been no need for §209(e)(1)(B).

Finally, so far as precedent goes, the only decision that has thus far interpreted §209(e)(1)(B), Commonwealth of Pennsylvania v.I.C.C., 535 F.2d 91, 93 (D.C. Circ. 1976), is in accord with the views here expressed.

The Court thus feels bound to deny the defendant's motion to dismiss and rather, excercising the powers conferred

upon us by §209(g), to enter an order granting summary judgment permanently enjoining the Michigan action plaintiffs from prosecuting the Michigan action. We trust that the parties will be able to agree on the terms of an order. If not, this may be settled on five days notice.

/s/
HENRY J. FRIENDLY
Presiding Judge

/s/
JOHN MINOR WISDOM
Judge

/s/
ROSZEL C. THOMSEN
Judge

DATED: April 30, 1981

71-A

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Filed May 22, 1981

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

LESLIE R. HINDS
4973 Hubbard
Troy, Michigan 48084

DARLENE THOMAS
2183 Old Goddard Road
Lincoln Park, Michigzn 48146

CRESCENCIO S. MIRANDA
3001 Wolverine Avenue
Ann Arbor, Michigan 48104

NO: 81-3

DANIEL GAILLIARD
2815 North Marston Street
Philadelphia, Pennsylvania 19140

WILLIAM S. SMITH
5009 Seminole
Detroit, Michigan 48123

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION,
a Pennsylvania corporation
Six Penn Center
Philadelphia, Pennsylvania,

Defendant.

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PRECIS: COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The Plaitniffs, for their verified Complaint, allege as follows:

1. The Plaintiffs invoke the jurisdiction of this Court as a matter of necessity, without conceding the existence of same. In accordance with the holding of this Court in Consolidated Rail Corporation v. Hinds, No. 81-2, Sp. Ct., R.R.R.A., April 30, 1981, to the effect that the claim which is the subject matter of this action is within the original and exclusive jurisdiction of this Court under § 209(e)(1)(B) of the Regional Rail Reorganization Act of 1973, as amended, this Court has enjoined the Plaintiffs from prosecuting an action instituted by them before the United States District Court for the Eastern District of Michigan involving said claim. The Plaintiffs, therefore, must invoke the jurisdiction of this Court in order to prosecute their claim in a timely manner. This is a proceeding in equity to redress the violation of rights existing under the Constitution of the United States, in particular the Due Process Clause of the

Fifth Amendment thereto.

2. Plaintiff, LESLIE R. HINDS, is a citizen of the United States and resident of the State of Michigan. He is currently employed as a Yardmaster by Defendant, CONSOLIDATED RAIL CORPOARATION, at its facilities located at Detroit, Michigan. He has been employed by the Defendant since 1976. Prior to his employment with the Defendant he was employed by the Penn Central Railroad, which became a part of the Defendant, pursuant to the Regional Rail Reorganization Act of 1973. He is classified as a non-operating employee pursuant to §501(b)(1)(A) of the Staggers Rail Act of 1980, as will appear more fully herein. During his employment with the Penn Central Railroad, he was a member of the Yardmaster Union, which had collective bargaining agreements with the Penn Central Railroad that provided certain income protection to

the Plaintiff, HINDS, as will appear more fully herein. He is a protected employee within the meaning of §505 of the Regional Rail Reorganization Act of 1973 and within the meaning of §501(b) of the Staggers Rail Act of 1980.

3. Plaintiff, DARLENE THOMAS, is a citizen of the United States and resident of the State of Michigan. She is currently employed as a Clerk by Defendant, CONSOLIDATED RAIL CORPORATION, at its facilities located at Detroit, Michigan. She has been employed by the Defendant since 1953. Prior to her employment with the Defendant she was employed by the Penn Central Railroad Company, which became a part of the Defendant pursuant to the Regional Rail Reorganization Act of 1973. She is classified as a non-operating employee pursuant to §501(b)(1)(A) of the Staggers Rail Act of 1980, as will appear more fully herein. During her employment

with the Penn Central Railroad she was a member of the B.R.A.C. union, which had collective bargaining agreements with the Penn Central Railroad that provided certain income protection to the Plaintiff, THOMAS, as will appear more fully herein. She is a protected employee within the meaning of §505 of the Regional Rail Reorganization Act of 1973 and within the meaning of §501(b) of the Staggers Rail Act of 1980.

4. Plaintiff, CRESCENCIO S. MIRANDA, is a citizen of the United States and resident of the State of Michigan. He is currently employed as a Maintenance Foreman by Defendant, CONSOLIDATED RAIL CORPORATION, at its facilities located at or near Ann Arbor, Michigan. He has been employed by the Defendant since 1956. Prior to his employment with the Defendant he was employed by the Penn Central Railroad, which became a part of the Defendant pursuant to the Regional Rail Reorganization

Act of 1973. He is classified as a non-operating employee pursuant to §501 (b)(1)(A) of the Staggers Rail Act of 1980, as will appear more fully herein. During his employment with the Penn Central Railroad, he was a member of the Maintenance-of-Way Union, which had collective bargaining agreements with the Penn Central Railroad that provided certain income protection to the Plaintiff, MIRANDA, as will appear more fully herein. He is a protected employee within the meaning of §505 of the Regional Rail Reorganization Act of 1973 and within the meaning of §501(b) of the Staggers Rail Act of 1980.

5. Plaintiff, DANIEL GAILLIARD, is a citizen of the United States and resident of the State of Pennsylvania. He is currently employed as an Electrical Relief Operator by Defendant, CONSOLIDATED RAIL CORPORATION, at its facilities located at Philadelphia, Pennsylvania. He has been

employed by the Defendant since 1947. Prior to his employment with the Defendant he was employed by Redding Railroad, which became a part of the Defendant, pursuant to the Regional Rail Reorganization Act of 1973. He is classified as a non-operating employee pursuant to §501(b)(1)(A) of the Staggers Rail Act of 1980, as will appear more fully herein. During his employment with the Penn Central Railroad he was a member of the IBEW Union, which had collective bargaining agreements with the Penn Central Railroad that provided certain income protection to the Plaintiff, GAILLIARD, as will appear more fully herein. He is a protected employee within the meaning of §505 of the Regional Rail Reorganization Act of 1973 and within the meaning of §501(b) of the Staggers Rail Act of 1980.

6. Plaintiff, WILLIAM S. SMITH, is a citizen of the United States and a resident of the State of Michigan. He is currently

employed as a Carman by Defendant, CONSOLIDATED RAIL CORPORATION, at its facilities located at Detroit, Michigan. He has been employed by the Defendant since 1945. Prior to his employment with the Defendant he was employed by the Penn Central Railroad, which became a part of the Defendant pursuant to the Regional Rail Reorganization Act of 1973. He is classified as a non-operating employee pursuant to §501(b)(1)(A) of the Staggers Rail Act of 1980, as will appear more fully herein. During his employment with the Penn Central Railroad, he was a member of the T.W.U. Union, which had collective bargaining agreements with the Penn Central Railroad that provided certain income protection to the Plaintiff, SMITH, as will appear more fully herein. He is a protected employee within the meaning of §505 of the Regional Rail Reorganization Act of 1973 and within the meaning of

§501(b) of the Staggers Rail Act of 1980.

7. Pursuant to FRCP 23(b)(2), Plaintiffs sue on behalf of themselves and on behalf of all persons similarly situated. Specifically, Plaintiffs HINDS,THOMAS, GAILLIARD and SMITH sue for employees of the Defendant CONSOLIDATED RAIL CORPORATION, who are classified as non-operating employees pursuant to §501(b)(1)(A) of the Staggers Rail Act of 1980 and who are protected employees within the mearing of §505 of the Regional Rail Reorganization Act of 1973 and within the meaning of §501(b) of the Staggers Rail Act of 1980. Specifically, Plaintiff, MIRANDA, sues on behalf of all employees of the Defendant, CONSOLIDATED RAIL CORPORATION, who are classified as maintenance-of-way employees pursuant to §501(b)(2) of the Staggers Rail Act of 1980 and who are protected employees within the meaning of §501(b) of the Staggers Rail Act of 1980. The non-operating employees

represented by Plaintiffs HINDS, THOMAS, GAILLIARD and SMITH, and the maintenance-of-way employees represented by Plaintiff, MIRANDA, both constitute classes so numerous as to make it impracticable to bring them before this Court. There are common questions of law and of fact affecting the rights of said persons to the equal protection of the laws guaranteed by the Fifth Amendment's Due Process Clause, and common relief is sought. The claims of Plaintiffs HINDS, THOMAS, GAILLIARD and SMITH are typical of the claims of the class of non-operating employees and the claims of the Plaintiff, MIRANDA, are typical of the claims of the class of maintenance-of-way employees. The Defendant has acted and intends to continue to act on grounds generally applicable to each class of employees, thereby making appropriate final injunctive relief with respect to each class of employees as a whole. The Plaintiffs will fairly and

adequately represent the interests of each class of employees. Hereinafter, the use of the term "non-operating employees" and the term "maintenance-of way employees" refers to each class as a whole.

8. Defendant, CONSOLIDATED RAIL CORPORATION, (hereinafer "CONRAIL"), is a for-profit corporation established in accordance with the provisions of §301 of the Regional Rail Reorganization Act of 1973 to carry out the purposes of said Act. Pursuant to the provisions of §§505, 509 of said Act and §504 of the Staggers Rail Act of 1980, it is charged by Congress with administering the provisions of law relating to the income protection of CONRAIL employees, as will be set forth more fully herein.

9. The Regional Rail Reorganization Act of 1973 was designed to reorganize the railroads in the midwest and northeast region into an economically viable system

capable of providing adequate and efficient rail service to the region. Pursuant to that Act, in 1974 various railroads currently operating in that region were organized into CONRAIL in accordance with the detailed requirements of the Act. The Act provided for the conveyance of the properties of the various railroads to CONRAIL, for the disposition of those properties that were not necessary for the efficient operation of CONRAIL, and for the discontinuation of certain rail services previously furnished by the various railroads that were reorganized into CONRAIL.

10. Prior to the reorganization of the various railroads into CONRAIL these railroads had entered into widely varying collective bargaining agreements with the different unions representing the different classes and crafts of railroad employees. These agreements

contained guaranteed employment rights and other employment "arbitraries" for the employee, often relating to particular trackage and particular runs. The various unions representing the Plaintiffs herein, namely, the Yardmasters Union, BRAC, TWU(Transportation Workers Union), Maintenance-of-Way and IBEW (International Brotherhood of Electrical Workers), had entered into collective bargaining agreements with the Defendant, CONRAIL, providing various degrees of guarantees, employment rights, and employment "arbitraries" for each of the Plaintiffs.

11. With the enactment of the Regional Rail Reorganization Act of 1973, Congress sought to end these widely varying collective bargaining agreements with the different unions representing the different classes and crafts of railroad employees. Specifically, it

sought to abolish the guaranteed employment rights and other employment "arbitraries" under these collective bargaining agreements, both to provide a uniform system of compensation for all CONRAIL employees, and to enable CONRAIL to dispose of unneeded railroad properties and to eliminate uneconomical service. §504 of the Act directed that there should be a single implementing agreement for each class and craft of employee, and that the new collective bargaining agreements "shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with these prescribed herein." Even prior to the time the single implementing agreements were completed, CONRAIL, was directed to convey unneeded properties, facilities and equipment pursuant to the Act, and with such conveyances, any employment rights provided

with respect to said properties, facilities and equipment under existing collective bargaining agreements.

12. In exchange for the loss of guaranteed employment rights and other employment "arbitraries" under the existing collective bargaining agreements, Congress established a system of employee income protection for adversely affected CONRAIL employees. The policy of Congress in this regard was stated as follows: "A protected employee whose employment is governed by a collective bargaining agreement will not, except as explicitly provided in this subchapter, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto." § 505(a). The primary means of income protection for employees who continued to be employed by CONRAIL, but who

were adversely affected with respect to compensation as a result of changes brought about by the reorganization, was in the form of monthly displacement allowances. The monthly displacement allowance for all classes of employees whose employment was governed by a collective bargaining agreement was computed on the basis of the total compensation received by the employee, including overtime pay, vacation allowances and monthly compensation guarantees, and the total time paid for during the last 12 months prior to his being adversely affected. This computation would produce an average monthly compensation for each employee. If the employee's compensation in his current position in any month was less than the average monthly compensation, the employee would be paid the difference, up to a maximum of $2,500 per month. The average monthly compensation would be adjusted to reflect subsequent general wage increases.

§ 505(b). The monthly displacement allowance would continue until the employee attained age 65 for protected employees with five (5) or more years of service, and for employees with less than five (5) years of service, for a period equal to the total years of prior service. Although employees who were not covered by a collective bargaining agreement, i.e., management employees, did not lose any existing guaranteed employment rights or employment "arbitraries", they were afforded the same income protection as the employees who were covered by a collective bargaining agreement. §505(i).

13. Protected employees who were deprived of employment could be required to transfer to other positions, including those involving a change of residence, in which instance they would receive moving expense benefits. § 505(d)(g). Employees with less than three (3) years service

could be terminated and receive a termination allowance. §505(f). Other protected employees could be tendered an offer to sever employment, and upon acceptance of that offer, would be entitled to a separation allowance not to exceed $20,000. § 505(e).

14, CONRAIL was responsible for the payment of the monthly displacement allowances, termination allowances, separation allowances, moving expenses and other costs associated with the employee protection program established by Congress. The sum of $250,000,000 was appropriated by Congress to a special Regional Rail Transportation Account, to cover the anticipated aggregate cost of employee protection. § 509. It was anticipated that a substantial number of employees would accept the severance of employment in exchange for a separation allowance, and that the aggregate sum of

$250,000,000 would not finally be expended until 2021, when the last CONRAIL employee eligible for income protection would retire.

15. That aggregate sum of $250,000,000, however, was exhausted by 1980. The anticipated voluntary severance of employment in exchange for a separation allowance had not occurred. The employees entitled to income protection were generally continuing their employment with CONRAIL, and as a result of the consolidation and reorganization of CONRAIL, were adversely affected with respect to their compensation. Approximately 13,000 employees per month were claiming monthly displacement allowances. The typical claim was for $400 per month, and about $5,200,000 was expended each month by CONRAIL on monthly displacement allowances.

16. As of September 1, 1980, the MDA for HINDS was $3,620.85, the MDA for GAILLIARD was $3,240.81, the MDA for

MIRANDA was $2,950.00, the MDA for THOMAS was $1,721.01 and the MDA for SMITH was $3,965.50.

17. Early in 1980, CONRAIL, together with the Federal Rail Transportation Administration of the Department of Transportation, returned to the Congress with a request for an additional appropriation to cover the payment of monthly displacement allowances and the other forms of employee protection. The request for the additional appropriation was coupled with a request for an amendment to the existing method of computing the monthly displacement allowance for CONRAIL employees. Although the computation of the monthly displacement allowance under the 1973 Regional Rail Reorganization Act was uniform for all employees, the requested amendments would provide a different method of computation for the generic classes of railroad employees:

management employees, operating employees, non-operating employees and maintenance-of-way employees. The proposed method of computing the monthly displacement allowances for the different classes of railroad employees was designed to insure that monthly displacement allowances would not be paid to non-operating employees and maintenance-of-way employees. CONRAIL and the Federal Rail Transportation Administration specifically represented to the Congress that under the proposed method of computing monthly displacement allowances, such allowances would not be paid to non-operating employees and maintenance-of-way employees, and they requested increased appropriations only to cover the anticipated cost of providing monthly displacement allowances to management employees and operating employees. The proposed amendments were adopted by Congress in the Staggers Rail Act of 1980, and Congress

appropriated an aggregate sum not to exceed $180,000,000 for the payment of monthly displacement allowances to adversely affected employees.

18. All or virtually all of the management employees who are protected employees within the meaning of § 505 of the Regional Rail Reorganization Act of 1973 and within the meaning of § 501(b) of the Staggers Rail Act of 1980 are White males. Approximately three-quarters of the maintenance-of-way employees who are protected employees within the meaning of § 505 of the Regional Rail Reorganization Act of 1973 and within the meaning of § 501(b) of the Staggers Rail Act of 1980 are Black and Hispanic. A substantial number of the non-operating employees who are protected employees within the meaning of § 505 of the Regional Rail Reorganization Act of 1973 and within the meaning of § 501(b) of the Staggers Rail Act of 1980

are Black or Hispanic or are women. The racial, ethnic and gender composition of the various generic classes of railroad employees was known to CONRAIL and to the Federal Rail Transportation Administration when they proposed an amendment to the existing method of computing the monthly displacement allowance for CONRAIL employees, as set forth herein. The racial, ethnic and gender composition of the various generic classes of railroad employees was known to Congress when it adopted the proposed amendments to the Staggers Rail Act of 1980, as set forth herein, and Congress intended to adopt a method of computing monthly displacement allowances that would favor those generic classes of railroad employees that consisted entirely or virtually entirely of White males.

19. Section 501 of the Staggers Rail Act of 1980 Amends § 505(b) of the

Regional Rail Reorganization Act of 1973 to provide different methods of computing the monthly displacement allowances for the four generic classes of railroad employees. Management employees retain exactly the same displacement allowance they have under § 505(b) and are in no way affected by the 1980 Act. Operating employees retain the same displacement allowance base they have under § 505(b). A maximum amount is imposed for each Interstate Commerce Commission classification of operating employees based on 1977 earnings, including straight time, overtime and "arbitraries", and adjusted for subsequent general wage increases, and provision is made to offset high monthly earnings against low monthly earnings rather than to make displacement allowance payments for each month in which the employee's earnings are below the prescribed amount. Since the displacement allowance base for

operating employees includes both overtime and straight time earnings for 1974 and is adjusted for subsequent general wage increases, all operating employees will keep the same monthly allowance they had prior to the 1980 amendment, except for those who had unusually high allowance, so that it would be in excess of the average total 1977 earnings of the classification of operating employees to which the particular employee belongs.

20. For non-operating and maintenance-of-way employees, the displacement allowance base is determined with reference to straight time earnings only, for non-operating employees as of September 1, 1979, adjusted for subsequent general wage increases, and for maintenance-of-way employees, on the basis of the employee's average hourly earnings for 1974 on a straight time basis, adjusted for subsequent general wage increases. The

maintenance-of-way employees are also subject to the same offset provision as the operating employees. Since the displacement allowance base for the non-operating and maintenance-of-way employees no longer includes both overtime and straight time earnings for 1974, as does the displacement allowance base for the operating employees, all non-operating and maintenance-of-way employees will lose the monthly displacement allowance that they had prior to the 1980 amendment. All of the management employees and substantially all of the operating employees will retain the monthly displacement allowance they had prior to the 1980 amendment. Under the new method of computing the monthly displacement allowance for non-operating employees and maintenance-of-way employees, it was projected by the Congress, upon the representation of CONRAIL and the Federal Rail Transportation Administration, that virtually no monthly

displacement allowance would have to be paid to non-operating and maintenance-of-way employees, and no funds were appropriated to cover anticipated monthly displacement allowance payments to these classes of employees.

21. Since the effective date of the Staggers Rail Act of 1980, none of the Plaintiffs, HINDS, THOMAS, GAILLIARD, MIRANDA and SMITH, have been entitled to a monthly displacement allowance during any month. It is alleged, upon the basis of information and belief, that since said time, few, if any, non-operating employees and maintenance-of-way employees have been entitled to a monthly displacement allowance during any month. It is further alleged, upon the basis of information and belief, that since said time, the level of payments of monthly displacement allowances to management and operating employees has been substantially the same, in

terms of volume and amount, as it was prior to said time.

22. The provisions of the Staggers Rail Act of 1980, which provide different methods of computing the monthly displacement allowances for the four generic classes of railroad employees, and which have the purpose and effect of enabling the management and operating employees to retain their current monthly displacement allowance while denying entirely monthly displacement allowances to non-operating and maintenance-of-way employees, are arbitrary, capricious and lacking in rational justification. The disfavored classes of employees - the class of non-operating employees and the class of maintenance-of-way employees - are identically situated to the operating employees with respect to the need for and entitlement to income protection in the form of monthly displacement allowances. Like the operating employees, the non-

operating employees and the maintenance-of-way employees gave up guaranteed employment rights and other employment "arbitraries" contained in existing collective bargaining agreements. The non-operating employees and the maintenance-of-way employees are even more favorably situated than the management employees with respect to the need for and entitlement to income protection in the form of monthly displacement allowances, since the management employees did not give up any guaranteed employment or other employment "arbitraries" contained in existing collective bargaining agreements. Since the disfavored classes of employees are at least identically situated to the favored classes of employees with respect to the need for and entitlement to income protection in the form of monthly displacement allowances, no conceivably legitimate governmental

interest can be advanced by a classification that allows the favored classes to retain their current monthly displacement allowances while denying entirely monthly displacement allowances to the disfavored classes of railroad employees. The classification is thus patently arbitrary and irrational and deprives the non-operating employees and the maintenance-of-way employees of the equal protection of the laws guaranteed by the Fifth Amendment's Due Process Clause.

23. As a result of the unconstitutional actions described herein, the Plaintiffs and the class they represent have suffered, and unless such actions are restrained by this Court, will continue to suffer great, immediate and irreparable injury, in violation of the rights guaranteed to them by the Constitution of the United States. The Plaintiffs and the class they represent have no plain, speedy and adequate remedy at law, and the

present suit is the only means of securing the relief requested.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

A. That this Court advance this matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

B. That a declaratory judgment be entered to the effect that § 501 of the Staggers Rail Act of 1980, which provides different methods for computing the monthly displacement allowances for the four generic classes of railroad employees, and which has the purpose and effect of enabling the management and operating employees to retain their current monthly displacement allowances while denying monthly displacement allowances entirely to non-operating and maintenance-of-way employees, are arbitrary, capricious and lacking in rational justification, and thus deprive the classes of non-operating

employees and maintenance-of-way employees of the equal protection of the laws guaranteed by the Fifth Amendment's Due Process Clause.

C. That a permanent injunction issue against the Defendant CONRAIL, directing the Defendant to administer the program of income protection for CONRAIL employees established by the Regional Rail Reorganizational Act of 1973, in accordance with the requirements of the Constitution of the United States.

D. That the Defendant, CONRAIL, be ordered to present to this Court, within thirty (30) days from the date of this Court's order thereof, a plan setting forth how the Defendant proposes to administer the program of income protection for CONRAIL employees established by the Regional Rail Reorganization Act of 1973, in accordance with the requirements of the Constitution of the United States.

Specifically, the plan shall provide for the administration of said program of income protection in the following ways, alternatively or in combination:

(1) All classes of railroad employees - management, operating, non-operating and maintenance-of-way - shall retain the same monthly displacement allowance base they have under § 505(b) of the Regional Rail Reorganization Act of 1980;

(2) A maximum amount shall be determined for each classification of management, non-operating and maintenance-of-way employees, as is determined for operating employees under Section 501 of the Staggers Rail Act of 1980, and subject to said maximum amount and to the offset provisions of Section 501 of the Staggers Rail Act of 1980, all employees shall have the same monthly displacement allowance

base they have under § 505(b) of the Regional Rail Reorganization Act of 1973;

(3) The monthly displacement allowance for all classes of railroad employees shall be reduced by 25%, representing the percentage difference between the aggregate appropriation for employee income protection under the Regional Rail Reorganization Act of 1973 and the aggregate appropriation for employee income protection under the Staggers Rail Act of 1980.

E. That upon the presentation of said plan by the Defendant, CONRAIL, and its approval by this Court, the Defendant shall recompute the amounts to which each protected employee would have been entitled had the plan been in effect as of October 1, 1980, and shall make payments to each protected employee accordingly.

F. That pending the final disposition of this case, a preliminary injunction issue against the Defendant, CONRAIL, directing it to continue making payments of monthly displacement allowances to protected employees in accordance with the monthly displacement allowance to which they are entitled under § 505(b) of the Regional Rail Reorganization Act of 1973, without regard to the provisions of the Staggers Act of 1980, changing the computation of the monthly displacement allowance for non-operating employees and maintenance-of-way employees.

G. That this Court enter such other relief as the Plaintiffs, or any of them, or the members of the class, may appear to be entitled.

H. That the Plaintiffs be awarded their costs herein, including reasonable attorney fees.

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EMPLOYEE PROTECTION

Sec. 505(a) EQUIVALENT POSITION. A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto.

(b) MONTHLY DISPLACEMENT ALLOWANCE. A protected employee, who has been deprived of employment or adversely affected with respect to his compensation shall be entitled to a monthly displacement allowance computed as follows:

(1) Said allowance shall be determined by computing the total compensation received by the employee, including vacation allowances and monthly compensation guarantees, and his total time paid for during the last

12 months immediately prior to his being adversely affected in which he performed compensated service more than 50 per centum of each of such months, based upon his normal work schedule, and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for; and, if an employee's compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less any time lost on account of voluntary absences other than vacations, but said protected employee shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of his average monthly time, provided, however, that

(A) in determining compensation in his current employment the protected

employee shall be treated as occupying the position, producing the highest rate of pay to which his qualifications and seniority entitle him, under the applicable collective bargaining agreement and which does not require a change in residence;

(B) the said monthly displacement allowance shall be reduced by the full amount of any unemployment compensation benefits received by the protected employee and shall be reduced by an amount equivalent to any earnings of said protected employee in any employment subject to the Railroad Retirement Act and 50 per centum of any earnings in any employment not subject to the Railroad Retirement Act.

(C) a protected employee's average monthly compensation shall be adjusted from time to time thereafter to reflect subsequent general wage increases;

(D) should a protected employee's service total less than 12 months in which he performs more than 50 per centum compensated service based upon his normal work schedule in each of said months, his average monthly compensation shall be determined by dividing separately the total compensation received by the employee and the total time for which he was paid by the number of months in which he performed more than 50 per centum compensated service based upon his normal work schedule; and

(E) the monthly displacement allowance provided by this section shall in no event exceed the sum of $2 `0 in any month except that such amount shall be adjusted to reflect subsequent general wage increases.

(2) A protected employee's average monthly compensation under this section shall be based upon the rate of pay applicable to his employment and

shall include increases in rates of pay not in fact paid but which were provided for in national railroad labor agreements generally applicable during the period involved.

(3) If a protected employee who is entitled to a monthly displacement allowance served as an agent or a representative of a class or craft of employees on either a full or part time basis in the 12 months immediately preceding his being adversely affected, his monthly displacement allowance shall be computed by taking the average of the average monthly compensation and average monthly time paid for of the protected employees immediately above and below him on the same seniority roster or his own monthly displacement allowance, whichever is greater.

(4) An employee and his representative shall be furnished with a

protected employee's average monthly compensation and average monthly time paid for, computed in accordance with the terms of this subsection, together with the data upon which such computations are based, within 30 days after the protected employee notifies the Corporation in writing that he has been deprived of employment or adversely affected with respect to his compensation.

(c) DURATION OF DISPLACEMENT ALLOWANCE. The monthly displacement allowance provided for in subsection (b) of this section shall continue until the attainment of age 65 by a protected employee with 5 or more years of service on the effective date of this Act and, in the case of a protected employee who has less than 5 years of service on such date, shall continue for a period equal to his total prior years of service; provided, that such monthly displacement allowance shall terminate upon the protected

employee's death, retirement, resignation, or dismissal for cause; and shall be suspended for the period of disciplinary suspensation for cause, failure to work due to illness or disability, voluntary furlough, or failure to retain or obtain a position available to him by the exercise of his seniority rights in accordance with the provisions of this section.

(d) TRANSFER (1) A protected employee who has been deprived of employment may be required by the Corporation, in inverse seniority order and upon reasonable notice, to transfer to any bona fide vacancy for which he is qualified in his same class or craft of employee on any part of the Corporation's system and shall then be governed by the collective bargaining agreement applicable on the seniority district to which transferred. If such transfer requires a change in residence, any such protected employee may choose (A) to voluntarily

furlough himself at his home location and have his monthly displacement allowance suspended during the period of voluntary furlough, or (B) to be severed from employment upon payment to him of a separation allowance computed as provided in subsections (e) and (f) of this section, which separation allowance shall be in lieu of all other benefits provided by this title.

(2) Such protected employee shall not be required to transfer to a location requiring a change in residence unless there is a bona fide need for his services at such location. Such bona fide need for services contemplates that the transfer be to a position which has not and cannot be filled by employees who are not required to make a change in residence in the seniority district involved and which, in the absence of this section, would have required the employment of a new employee.

(3) Such protected employee who, at the request of the Corporation, has once

accepted and made a transfer to a location requiring a change in residence shall not be required again to so transfer for a period of 3 years.

(4) Transfers to vacancies requiring a change in residence shall be subject to the following:

(A) The vacancy shall be first offered to the junior qualified protected employee deprived of employment in the seniority district where the vacancy exists, and each such employee shall have 20 days to elect one of the options set forth in paragraph (1) of this subsection. If that employee elects not to accept the transfer, it will then be offered in inverse seniority order to the remaining qualified, protected employees deprived of employment on the seniority district, who will each have 20 days to elect one of the options set forth in paragraph (1) of this subsection.

(B) If the vacancy is not filled by the procedure in paragraph (4)(A) of this subsection, the vacancy will then be offered in the inverse order of seniority to the qualified protected employees deprived of employment on the system and each of such employees will be afforded 30 days to elect one of the options set forth in paragraph (1) of this subsection.

(C) The provisions of this paragraph shall not prevent the adoption of other procedures pursuant to an agreement made by the Corporation and representative of the class or craft of employees involved.

(e) SEPARATION ALLOWANCE. A protected employee who is tendered and accepts an offer by the Corporation to resign and sever his employment relationship in consideration of payment to him of a separation allowance, and any protected employee whose employment relationship is severed in accordance with subsection (d) of this section, shall be entitled

to receive a lump sum separation allowance not to exceed $20,000 in lieu of all other benefits provided by this title. Said lump sum separation allowance, in the case of a protected employee who had not less than 3 nor more than 5 years of service as of the date of this Act, shall amount to 270 days pay at the rate of the position last held and, in the case of a protected employee having had 5 or more years' service, shall amount to the number of days pay indicated below at the rate of the position last held dependent upon the age of the protected employee at the time of such termination of employment:

60 or under. . . . . .360 days' pay

61 . . . . . .300 days' pay

62 . . . . . .240 days' pay

63 . . . . . .180 days' pay

64 . . . . . .120 days' pay

(f) TERMINATION ALLOWANCE. The corporation may terminate the employment of an employee of a railroad in reorganization, who has less than 3 years service of the

effective date of this Act: Provided, however, that in such event the terminated employee shall be entitled to receive a lump sum separation allowance in an amount determined as follows:

2 to 3 years' service....	180 days' pay at the rate of the position last held.
1 to 2 years' service....	90 days' pay at the rate of the position last held.
Less than 1 year's service.....	5 days' pay at the rate of the position last held for each month of service.

(g) MOVING EXPENSE BENEFITS. Any protected employee who is required to make a change of residence as the result of a transaction shall be entitled to the following benefits:

(1) Reimbursement for all expenses of moving his household and other personal effects, for the traveling expense of himself and members of his family, including living expenses for himself and his family, and for his own

actual wage loss, not to exceed 10 working days. Provided: That the Corporation or acquiring railroad shall, to the same extent provided above, assume said expense for any employee furloughed within 3 years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the Corporation or acquiring railroad, within 90 days after the date on which the expenses were incurred.

(2)(A)(i) If the protected employee owns, or is under a contract to purchase, his own home in the locality from which he is required to move and elects to sell said home, he shall be reimbursed for any loss suffered in the sale of his home for less than its fair market value. In each case the fair

market value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The Corporation of an acquiring railroad shall in each instance be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person.

(ii) A protected employee may elect to waive the provisions of paragraph (2)(A)(i) of this subsection and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in the jurisdiction in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed $3,000 or 6 per centum of sale price, whichever is less) and any prepayment penalty required by the institution holding the mortgage; such

costs shall not include the payment of any "points" by the seller.

(B) If the protected employee holds an unexpired lease on a dwelling occupied by him at his home, he shall be protected from all loss and cost in securing the cancellation of said lease.

(C) No claim for costs or loss shall be paid under the provisions of this paragraph unless the claim is presented to the Corporation or an acquiring railroad within 90 days after such costs or loss are incurred.

(D) Should a controversy arise with respect to the value of the home, the costs or loss sustained in its sale, the costs or loss under a contract for purchase, loss or cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or his representative, and the Corporation or an acquiring

railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the Corporation or acquiring railroad and these two, if unable to agree upon a valuation within 30 days, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third qualified real estate appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral

appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(h) APPLICATION OF TITLE. Should a railroad rearrange or adjust its efforts in anticipation of a transaction with the purpose or effect of depriving a protected employee of benefits to which he otherwise would have become entitled under this title, the provisions of this title will apply to such employee.

SUBCHAPTER V OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973, AS AMENDED BY THE STAGGERS RAIL ACT OF 1980. 45 U.S.C. §§771-780

§771. Definitions

As used in this subchapter unless the context otherwise requires -

(1) "acquiring railroad" means a railroad, except the Corporation or any subsidiary thereof, which seeks to acquire or has acquired, pursuant to the provisions of this chapter, all or a part of the rail properties of one or more of the railroads in reorganization, the Corporation or any subsidiary thereof, or a profitable railroad;

(2) "employee of a railroad in reorganization" means a person who, on the effective date of a conveyance of rail properties of a railroad in reorganization to the Corporation or any subsidiary thereof, to the National Railroad Passenger Corporation, to an acquiring railroad, or to a State pursuant to section 719(d) (2) of this title has an

employment relationship with either said railroad in reorganization or any carrier (as defined in parts I and II of the Interstate Commerce Act) which is leased, controlled, or operated by the railroad in reorganization (except a Class I railroad which is not wholly owned, operated, or leased by a railroad in reorganization but is controlled by a railroad in reorganization), but does not include a president, vice-president, treasurer, secretary, comptroller, and any other person who performs functions corresponding to those performed by the foregoing officers;

(3) "protected employee" means any employee of -

(A) an acquiring or selling railroad who is adversely affected by a transaction;

(B) the Corporation who, immediately preceding such employment by the Corporation, was employed by a selling

railroad and who is adversely affected by the sale of rail properties to the Corporation pursuant to an offer designated under section 716 (c) (2) of this title;

(C) a railroad in reorganization in the region; and

(D) a railroad who is adversely affected by a supplemental transaction under section 745 of this title or by a project recommended under section 716(g) of this title;

who, in any such case, has not reached age 65 on the effective date of this Act;

(4) "class or craft of employees" means a group of employees, recognized and treated as a unit for purposes of collective bargaining, which is represented by a labor organization that has been duly authorized or recognized pursuant to the Railway Labor Act as its representative for purposes of collective bargaining;

(5) "representative of a class or craft of employees" means a labor organization which has been duly authorized or recognized as the collective bargaining representative of a class or craft of employees pursuant to the Railway Labor Act;

(6) "deprived of employment" means the inability of a protected employee to obtain a position by the normal exercise of the seniority rights with the Corporation or a subsidiary thereof; PROVIDED, HOWEVER, That provisions in existing collective bargaining agreements of a railroad in reorganization, which do not require a protected employee, in the normal exercise of seniority rights, to make a change in residence, in order to maintain his protection, will be preserved and will also be extended and be applicable to all other protected employees of that same craft or class. It shall not, however, include any deprivation of employment by reason of death, retirement, resignation,

dismissal or disciplinary suspension for cause, failure to work due to illness or disability, failure to work due to strike, fire, flood, snowstorm, hurricane, earthquake, tornado, or other similar natural occurrence that causes a suspension of operations in whole or in part and precludes performance of the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions, nor any severance of employment covered by subsections (d) and (e) of section 775 of this title;

(7) "employee adversely affected with respect to his compensation" means a protected employee who suffers a reduction in compensation;

(8) "transaction" means actions taken pursuant to the provisions of this chapter, including section 745 thereof, or the results thereof;

(9) "change in residence" means transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former work location and farther from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former work location;

(10) "selling railroad means a railroad which sells rail properties pursuant to an offer designated under section 716(c)(2) of this title;

(11) "replacement operator" means -

(A) a State which has acquired all or part of the rail properties of any railroad in reorganization in the region and which intends to replace any class I railroad as the operator of rail service over such rail properties; or

(B) any class I railroad which is designated, by a State which has

acquired such rail properties, to replace the State or any other class I railroad as the operator of rail service over such rail properties; and

(12) "compensation" means earnings in employment subject to the Railroad Retirement Act.

Pub. L 93-236, Title V, §501, Jan. 2, 1974, 87 Stat. 1012, amended, Pub. L 94-210, Title VI, §§607(1), 613, Feb. 5, 1976, 90 Stat. 97, 112; Pub. L 94-248, § 5, March 25, 1976, 90 Stat. 286; Pub. L 94-555, Title II, §207(a), Oct. 19, 1976, 90 Stat. 2621; Pub. L 96-448, Title V, §508(d), Oct. 14, 1980, 94 Stat. 1957.

§772. Employment offers

(a) Applicable law. - The Corporation and, where applicable, the Association shall be subject to the provisions of the Railway Labor Act and shall be considered employers for purposes of the Railroad Retirement Act, Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. The Corporation,

in addition, shall, except as otherwise specifically provided by this Chapter, be subject to all Federal and State laws and regulations applicable to carriers by railroad. As used in this subsection, the term "where applicable" refers to the relation of the Association, as an employer (a) to employees of the Association who, before the date of conveyance, under section 745(b) (1) of this title, had creditable service under the relevant statute and who were offered and accepted coverage under such statute, and (b) to former employees of railroads in reorganization in the region, after the date of such conveyance.

(b) Mandatory Offer. - The Corporation shall offer employment, to be effective as of the date of a conveyance or discontinuance of service under the provisions of this chapter, to each employee of a railroad in reorganization in the region who has not already accepted an offer of employment by

the Assocation (where applicable), an acquiring railroad, or the Corporation. Such offers of employment to employees represented by labor organizations shall be confined to their same craft and class. The Corporation shall apply to such employees the protective provisions of this subchapter.

(c) Association. - After the Transfer of rail properties pursuant to section 743 of this title, the Association, in employing any additional employees, shall give priority consideration to employees of a railroad in reorganization and the provisions of this subchapter shall apply to any such employees employed by the Association as if they were employees of the Corporation.

Pub. L. 93-236, Title V, §502, Jan. 2, 1974, 87 Stat. 1013, amended Pub. L. 94-210, Title VI, §614, Feb. 5, 1976, 90 Stat. 112.

§773. Assignment of work

The Corporation shall have the right to assign, allocate, reassign, reallocate, and

consolidate work formerly performed on the rail properties acquired pursuant to the provisons of this chapter from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this chapter, subject, however to the provisions of Section 778 of this title.

Pub. L. 93-236, Title V, §503, Jan. 2, 1974, 87 Stat. 1014.

§774. Collective-bargaining agreements

(a) Interim application. - Until completion of the agreements provided for under subsection (d) of this section, the Corporation shall, as though an original party thereto, assume and apply on the particular lines, properties, or facilities acquired all obligations under existing collective-bargaining agreements covering all crafts and classes employed thereon, except that the Agreement of May 1936, Washington, D.C. and provisions in other existing job stabilization agreements shall not be applicable to transactions effected pursuant to this chapter with respect to which the provisions of section 775 of this title shall be superseding and controlling. During this period, employees of a railroad in reorganization who have seniority on the lines, properties, or facilities acquired by the Corporation pursuant to this chapter shall have prior seniority roster rights on such acquired

lines, properties, or facilities.

(b) Single implementing agreement. - On or before the date of the adoption of the final system plan by the Board of Directors of the Association as provided in Section 717 (c) of this title, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance pursuant to this chapter and representatives of the Corporation shall commence negotiation of a single implementing agreement for each class and craft of employees affected providing (1) the identification of the specific employees of the railroad in reorganization to whom the Corporation offers employment; (2) the procedure by which those employees of the railroad in reorganization may elect to accept employment with the Corporation; (3) the procedure for acceptance of such employees into the Corporation's employment and their assignment to positions on the

Corporation's system; (4) the procedure for determining the seniority of such employees in their respective crafts or classes on the Corporation's system which shall, to the extent possible, preserve their prior seniority rights; and (5) the procedure for determining equitable adjustment in rates of comparable positions. If no agreement with respect to the matters referred to in this subsection is reached by the end of 30 days after the commencement of negotiations, the parties shall within an additional 10 days select a neutral referee and, in the event they are unable to agree upon the selection of such referee, then the National Mediation Board shall immediately appoint a referee. After a referee has been designated, a hearing on the dispute shall commence as soon as practicable. Not less than 10 days prior to the effective date of any conveyance pursuant to the provisions of this chapter, the referee shall resolve and decide all

matters in dispute with respect to the negotiation of said implementing agreement or agreements and shall render a decision which shall be final and binding and shall constitute the implementing agreement or agreements between the parties with respect to the transaction involved. The salary and expenses of the referee shall be paid pursuant to the provisions of the Railway Labor Act.

(c) Relationship to other provisions. - Notwithstanding failure for any reason to complete implementing agreement provided for in subsection (b) of this section, the Corporation may proceed with a conveyance of properties, facilities, and equipment pursuant to the provisions of this chapter and effectuate said transaction; PROVIDED, That all protected employees shall be entitled to all of the provisions of such agreements, as finally determined, from the time they are adversely affected as a result of any such conveyance.

(d) New collective-bargaining agreements. - Not later than 60 days after the effective date of any conveyance pursuant to the provisions of this chapter, the representatives of the various classes of crafts of the employees of a railroad in reorganization involved in a conveyance and representatives of the Corporation shall commence negotiation of a new single collective-bargaining agreement for each class and craft of employees covering the rate of pay, rules, and working conditions of employees who are employees of the Corporation. Such collective-bargaining agreement shall include appropriate provisions concerning rates of pay, rules, and working conditions, but shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this chapter which may exceed or conflict with those established herein. Negotiations with respect to such single collective-bargaining agreement, and any successor thereto, shall be conducted systemwide.

(e) Liability for employee claims. - In all cases of claims by employees, arising under the collective bargaining agreements of the railroads in reorganization in the region, and subject to section 153 of this title, the Corporation, the National Railroad Passenger Corporation, or an acquiring carrier, as the case may be, shall assume responsibility for the processing of any such claims, and payment of those which are sustained or settled on or subsequent to the date of conveyance, under section 743(b)(1) of this title, and shall be entitled to direct reimbursement from the Association, pursuant to section 721(h) of this title, to the extent that such claims are determined by the Association to be the obligation of a railroad in reorganization in the region. Any liability of an estate of a railroad in reorganization to its employees which is assumed, processed, and paid, pursuant to this subsection, by the Corporation, the National Railroad Passenger

Corporation, or an acquiring carrier shall remain the preconveyance obligation of the estate of such railroad for purposes of Section 721(h)(1) of this title. The Corporation, the National Railroad Passenger Corporation, an acquiring carrier, or the Association, as the case may be, shall be entitled to a direct claim as a current expense of administration, in accordance with the provisions of section 721(h) of this title (other than paragraph (4) (A) thereof), for reimbursement (including costs and expenses of processing such claims) from the estate of the railroad in reorganization on whose behalf such obligations are discharged or paid. In those cases in which claims for employees were sustained or settled prior to such date of conveyance, it shall be the obligation of the employees to seek satisfaction [1] against the estates of the railroads in reorganization which were their former employers.

(f) Transfer of employees to the National Railroad Passenger Corporation or acquiring railroads. - Notwithstanding any otherwise applicable provisions of this subchapter, protected employees to whom the Corporation has made offers of employment may be transferred to the National Railroad Passenger Corporation in accordance with the following procedure:

(1) Not later than 90 days after the date of completion of the transaction required by section 716(c) of this title, implementing agreement negotiations between representatives of the various crafts or classes of employees associated with the involved properties, the Corporation, and the National Railroad Passenger Corporation shall commence. These negotiations shall [2] -

(A) Identify the specific employees of the Corporation to whom the National Railroad Passenger Corporation offers employment;

(B) the procedure by which those employees of the Corporation may elect to accept employment with the National Railroad Passenger Corporation;

(C) the procedure for acceptance of such employees into the National Railroad Passenger Corporation's employment; and

(D) the procedure for determining the seniority of such employees in their respective crafts or classes on the National Railroad Passenger Corporation's system which shall, to the extent possible, preserve their prior seniority rights.

If no agreement regarding the matters referred to in this subsection is reached by the end of 60 days after the date of commencement of negotiations (which shall also be a date which is at least 90 days after the transaction contemplated by section 791(d) of this title), upon

notice of any party, all parties thereto shall within an additional 10 days select a neutral referee. If such parties are unable to agree upon the selection of such a referee, the National Mediation Board shall promptly appoint a referee. Hearings shall commence not later than 30 days after the date of selection or appointment of such referee, and a decision shall be rendered by such referee within 60 days after the date of commencement of the hearings. The referee shall resolve and decide all matters in dispute regarding the negotiation of the implementing agreement or agreements. All parties may participate, but the referee shall have the only vote. The referee's decision shall be final and binding and shall constitute the implementing agreement or agreements between the parties. The salary and expenses of the referee shall be paid

pursuant to the provisions of the Railway Labor Act.

(2) Prior to implementation of an agreement or agreements pursuant to paragraph (1) of this subsection, the representatives of the various crafts or classes of employees designated to be transferred to the National Railroad Passenger Corporation shall meet with representatives of the National Railroad Passenger Corporation for the purposes of negotiation agreements regarding rates of pay, rules, and working conditions. If, 60 days after the date of commencement of such negotiations, no agreement has been reached, the bargaining agreement in existence on the rail properties from which the employees are to be transferred and which is applicable to the craft or class of employees being transferred will apply and such implementing agreement will be put into effect.

(3) An employee of the Corporation who is entitled to protection and who is transferred as a result of an acquisition pursuant to this chapter, or as a result of the designation of a replacement operator, shall, upon transfer to the National Railroad Passenger Corporation, an acquiring railroad, or a replacement operator, carry with him his protected status. The National Railroad Passenger Corporation, an acquiring railroad, or a replacement operator, as new employers, shall be responsible for payment of protective benefits and shall be entitled to reimbursement pursuant to section 779 of this title.

(4) The National Railroad Passenger Corporation may prior to completion of any of the agreements referred to in this section, offer employment to any noncontract employee. Noncontract employees accepting employment with the

National Railroad Passenger Corporation shall carry with them all rights and benefits accorded to them under this subchapter.

(g) Assumption of personal injury claims. - All cases or claims by employees or their personal representatives for personal injuries or death against a railroad in reorganization in the region arising prior to the date of conveyance of rail properties, pursuant to section 743 of this title, shall be assumed by the Corporation or an acquiring railroad, as the case may be. The Corporation or the acquiring railroad shall process and pay any such claims that are sustained or settled, and shall be entitled to direct reimbursement from the Association pursuant to section 721(h) of this title, to the extent that such claims are determined by the Association to be the obligation of such railroad. Any liability of an estate of a railroad in reorganization which is assumed,

processed, and paid, pursuant to this subsection, by the Corporation or an acquiring railroad shall remain the preconveyance obligation of the estate of such railroad for purposes of section 721(h)(1) of this title. The Corporation, an acquiring railroad, or the Association, as the case may be, shall be entitled to a direct claim as a current expense of administration, in accordance with the provisions of section 721(h) of this title (other than paragraph (4)(A) thereof), for reimbursement (including costs and expenses of processing such claims) from the estate of the railroad in reorganization on whose behalf such obligations are discharged or paid.

Pub. L. 93-236, Title V, §504, Jan. 2, 1974, 87 Stat. 1014, amended Pub. L. 94-210, Title VI, §615, Feb. 5, 1976, 90 Stat. 113; Pub. L. 94-555, Title II, §§207(b), 208 Oct.19, 1976, 90 Stat. 2622, 2623; Pub. L. 96-448, Title V, §506, Oct. 14, 1980, 94 Stat. 1956.

§775. Employee protection

(a) Equivalent position. - A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this subchapter, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto, including benefits under any employee pension benefit plan in effect on December 1, 1975, other than a plan maintained primarily for the purpose of providing deferred compensation for a select group of management personnel or other highly compensated employees. For the purposes of protecting employee pension benefits under this subchapter, the term "protected employee whose employment is governed by a collective-bargaining agreement" includes any beneficiary of, and any participant in, such plan,

including noncontract employees. The protected benefits of such beneficiary or participant, accrued as of the date of conveyance, may be limited to the amount guaranteed under terminated plans pursuant to title IV of the Employee Retirement Income Security Act of 1974. Pension benefits shall not be paid to any beneficiary of a terminated plan whose benefits are guaranteed by such Act.

(b) Monthly displacement allowance. - A protected employee shall be paid a monthly displacement allowance for any calendar month within the period identified in subsection (c) of this section in which the employee is deprived of employment or adversely affected with respect to such employee's compensation, in accordance with the following provisions:

(1) (A) Effective on the effective date of the Staggers Rail Act of 1980, the protected rate of pay of a protected nonoperating employee (other

than a maintenance-of-way employee) who has been deprived of employment or adversely affected with respect to such employee's compensation shall be based on the rate of pay of the position held by the employee on September 1, 1979, or if the employee held no position on that date, the rate of pay of the last position held by the employee prior to that date. A guaranteed hourly rate of pay will be computed for each protected employee, based on the rate described in the preceding sentence, and will be (i) the actual hourly rate for hourly rated employees, (ii) the daily rate divided by 8 for daily rated employees, and (iii) the monthly rate divided by the working days in the claim month, further divided by 8, in the case of monthly rated employees. For employees occupying relief positions, the guarantee shall be computed on the basis of the

weighted average daily rate of the positions relieved. Extra list employees will be guaranteed the extra list rate.

(B) In the event a protected employee's position is abolished or such employee is displaced and is thereby required to occupy a position paying an hourly rate that is less than such employee's guaranteed hourly rate, the protected employee shall be paid the difference between the hourly rate of pay of the position such employee is occupying and his guaranteed hourly rate for all hours included in the straight time work schedule of such employee's position for the month of claim, less any time lost on account of voluntary absences other than vacations. Hours worked in excess of the straight time work schedule shall be paid in addition to the guarantee at

the rate applicable to the position occupied, as provided for in the applicable collective bargaining agreement.

(C) For any month or portion thereof in which a protected employee is deprived of employment, the protected employee shall be paid such employee's guaranteed hourly rate for the number of hours such employee would have worked in the straight time work schedule of such employee's previously held position.

(D) Notwithstanding the provision that the protected rate shall be the rate of the position held on or immediately preceding September 1, 1979, if a protected employee becomes the permanent incumbent of a higher rated position and is not disqualified therefrom, the higher rate shall become such employee's protected rate.

(2) Notwithstanding paragraph (1) of this subsection, effective on the effective date of the Staggers Rail Act of 1980, a protected maintenance-of-way employee shall be afforded his average monthly compensation, which is defined as the total compensation received by such employee during the 12 months immediately preceding January 1, 1975, divided by his total time paid for during that period and multiplied by 174 or by his average monthly time paid for, whichever is less, and adjusted to reflect subsequent general wage increases. If a protected employee is deprived of employment or if the employee's straight-time compensation in his current position is less in any month than the employee's average monthly compensation, the employee shall be paid the difference between his straight-time earnings, if any, and 80 percent of the average monthly

compensation, less any time lost on account of voluntary absences other than vacations. If, at the close of the calendar year, the sum of the protected employee's annual straight-time compensation, monthly displacement allowance payments and offsets applicable pursuant to this subchapter is less than the employee's average monthly compensation multiplied by 12, the employees shall receive an additional payment representing the difference. If in the previous calendar year an employee has received displacement allowance payments in excess of his annual entitlement, the excess payments shall be recovered from any current or future entitlement to monetary benefits afforded by this subchapter, exclusive of benefits afforded by subsection (g) of this section.

(3) Effective on the effective date of the Staggers Rail Act of 1980 [2] a

protected operating employee (as defined in Interstate Commerce Commission classifications 107 through 128) who has been deprived of employment or adversely affected with respect to such employee's compensation shall be afforded his average monthly compensation computed in accordance with this subsection as in effect prior to such effective date, but subject to a maximum amount equal to one-twelfth of the average annual earnings of all employees in the Interstate Commerce classification, computed by cumulating the employee earnings reported to the Commission by the Corporation on a monthly basis for calendar year 1977 for the Interstate Commerce Commission classification of operating service in which such employee performed the preponderance of such employee's work in calendar year 1974, increased by applicable general wage increases. If the employee performed

no operating service in 1974, the Interstate Commerce Commission classification shall be determined by the preponderance of such employee's operating service in an immediately preceding calendar year. If the average monthly compensation of a protected operating employee exceeds the maximum amount described in the first sentence of this paragraph, the average monthly compensation of the employee will be reduced to such maximum amount for purposes of computing such employee's monthly displacement allowance, if any. If the average monthly compensation of a protected operating employee is less than such maximum amount, the average monthly compensation of the employee will be used to compute such employee's monthly displacement allowance, if any. If a protected employee is deprived of employment, or if the employee is adversely affected with respect to his compensation such that

the compensation in such employee's current position is less in any month than the average monthly compensation of the employee or such maximum amount, whichever is less, the employee shall be paid 75 per centum of the difference between such employee's earnings, if any, and the lesser figure, minus any time lost on account of voluntary absences other than vacations. If at the close of the calendar year the sum of the protected employee's annual earnings, monthly displacement allowance payments, and offsets applicable pursuant to this subchapter is less than such employee's average monthly compensation subject to the maximum amount and multiplied by 12, the employee shall receive an additional payment representing the difference. In the computation of the annual payment, if during the calendar year an employee has been force assigned to, or has been

required to exercise seniority to, a position in an Interstate Commerce Commission classification with a lesser maximum amount than the maximum amount applicable to such employee's 1974 Interstate Commerce Commission classification, such employee shall be paid the difference without credit being taken for compensation earned by virtue of actual working hours in the calendar year in excess of the number of hours paid for in such employee's average monthly compensation multiplied by 12 or such employee's annual 1977 maximum amount, whichever is less. An employee's compensation for purposes of this subsection shall not include savings sharing productivity payments received pursuant to paragraph (t) of the Crew Consist Agreement between the Corporation and the United Transportation Union dated September 8, 1978. If, in the previous calendar year, an employee has

received displacement allowance payments in excess of such employee's annual entitlement, the excess payments shall be recovered from any current or future entitlement to monetary benefits afforded by this subchapter, exclusive of benefits afforded by subsection (g) of this section.

(4) Effective on the effective date of the Staggers Rail Act of 1980, a protected noncontract employee who has been deprived of employment or adversely affected with respect to such employee's compensation shall retain his average monthly compensation and monthly displacement allowance computed in accordance with this subsection as in effect prior to such effective date. In the event such noncontract employee exercises or has exercised seniority in a craft or class of operating employees, the entitlement of such employee to a monthly displacement allowance and fringe benefits,

and such employee's eligibility of other protected employees in the craft or class in which seniority is exercised, except that the protected rate of pay shall be based on the rate of pay of the position first obtained through the exercise of seniority, rather than the rate of any position held on or prior to September 1, 1979.

(5) Notwithstanding the preceding provisions of this subsection, employees who, prior to September 1, 1979, accepted transfer to positions requiring a change of residence pursuant to subsection (d) of this section, shall retain their average monthly compensation and monthly displacement allowance computed in accordance with this subsection prior to the effective date of the Staggers Rail Act of 1980.

(6) In determining compensation in a protected employee's current employment,

such employee shall be treated as occupying the position producing the highest rate of pay to which such employee's qualifications and seniority entitle the employee under the applicable collective bargaining agreement and which does not require a change in residence. A protected operating employee will be considered to be occupying the position producing the highest rate of pay if the employee occupies a position producing compensation equal to such employee's average monthly compensation, subject to the maximum amount.

(7) With respect to a protected employee who has been deprived of employment, the monthly displacement allowance shall be reduced by (A) the full amount of any unemployment compensation benefits received by such employee, and (B) an amount equivalent to any outside earnings of such employee.

(8) A protected employee's average monthly compensation or protected rate of pay shall be adjusted from time to time thereafter to reflect subsequent general wage increases.

(9) The average monthly compensation or protected rate of pay provided by this section shall in no event exceed $2,500 in any month, except that such amount shall be adjusted to reflect general wage increases subsequent to April 1, 1976.

(10) A protected employee and his representative shall be furnished with such employee's protected rate of pay, or average monthly compensation and average monthly time paid for, subject to the maximum amount, computed in accordance with the terms of this subsection. Each protected employee who has been deprived of employment or his representative and the employer shall agree upon a procedure by which the employee shall keep the

employer currently informed of the unemployment compensation benefits received by such employee and the earnings of such employee in employment other than with such employer.

(11) In the case of a supplemental transaction -

(A) with respect to an employee described in paragraph (1) of this subsection who was not employed on September 1, 1979, the protected rate of pay of such employee shall be based on the rate of pay of the position held by such employee on the first day of the first month after September 1979 in which such employee was employed;

(B) with respect to an employee described in paragraph (2) of this subsection who was not employed during the 12 months immediately preceding January 1, 1975, the average monthly compensation of such employee shall be

determined on the basis of the first 12-month period after January 1, 1974, during which such employee was employed; and

(C) with respect to an employee described in paragraph (3) of this subsection -

(i) if such employee was employed during the 12 months immediately preceding January 1, 1975, the average monthly compensation of such employee shall be determined on the basis of such 12-month period; and

(ii) if such employee was not employed during the 12 months immediately preceding January 1, 1975, the preponderance of work of such employee shall be determined on the basis of the first 12-month period after January 1, 1974, during which such employee was employed.

(c) Duration of monthly displacement allowance. - The monthly displacement allowance provided for in subsection (b) of this section shall, in the case of a protected employee with 5 or more years of service on the effective date of this Act, continue until the attainment of age 65 by such employee, and shall, in the case of a protected employee who has less than 5 years of service on such date, continue for a period equal to the employee's total prior years of service, except that such monthly displacement allowance -

(1) shall terminate upon the protected employee's death, retirement, resignation, or dismissal for cause;

(2) shall not be paid with respect to any period of disciplinary suspension for cause, failure to work due to illness or disability, voluntary furlough, or failure to retain or obtain a position available to the employee by the exercise

of such employee's seniority rights in accordance with the provisions of this section;

(3) shall not be paid to a protected employee deprived of employment with respect to any period of failure to work due to strike, fire, flood, snowstorm, hurricane, earthquake, tornado, or other similar natural occurrence that causes a suspension of operations in whole or in part and precludes performance of the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions (but the payment of monthly displacement allowances shall be resumed upon termination of the emergency); and

(4) shall not be paid with respect to any month that commences after the effective date of the Staggers Rail Act of 1980 for which the employee has failed to make a

claim for such allowance within 3 full calendar months (unless otherwise agreed upon by the employee or his representative and the employer) after the last day of the month for which such allowance is sought, except that such 3-month limit shall not apply to any claim which is the subject of or is based upon an arbitration decision issued pursuant to section 777 of this title.

Unless otherwise agreed upon by the employee or his representative and the employer, the entitlement of an employee to an allowance shall be approved or denied within 150 days after the claim therefore is made if such claim is filed during the 12 month period beginning on the effective date of the Staggers Rail Act of 1980, and within 90 days after the claim therefor is made if such claim is filed after such 12-month period. Any claim not approved or denied at the expiration of the time limits described in the preceding

sentence shall be deemed approved.

(d) Transfer. - (1) A protected employee who has been deprived of employment may be required by the Corporation or other employers with employees protected under this section, in inverse seniority order and upon reasonable notice, to transfer to any bona fide vacancy for which he is qualified in his same class or craft of employee on any part of the Corporation's system or the system of other employers with employees protected under this section and shall then be governed by the collective-bargaining agreement applicable on the seniority district to which transferred. If such transfer requires a change in residence, any such protected employee may choose (A) to voluntarily furlough himself at his home location and have his monthly displacement allowance suspended during the period of voluntary furlough, or (B) to be severed from employment upon payment to him of a separation allowance computed as provided in subsections (e) and (f)

of this section, which separation allowance shall be in lieu of all other benefits provided by this subchapter.

(2) Such protected employee shall not be required to transfer to a location requiring a change in residence unless there is a bona fide need for his services at such location. Such bona fide need for services contemplates that the transfer be to a position which has not and cannot be filled by employees who are not required to make a change in residence in the seniority district involved and which, in the absence of this section, would have required the employment of a new employee. Notwithstanding any other provision of this subsection, a protected employee of the National Railroad Passenger Corporation shall not be required to transfer to a location outside the seniority district of such protected employee.

(3) Such protected employee who, at the request of the Corporation or other employers

with employees protected under this section, has once accepted and made a transfer to a location requiring a change in residence shall not be required again to so transfer for a period of 3 years.

(4) Except as provided in paragraph (5) of this subsection, transfers to vacancies requiring a change in residence shall be subject to the following:

(A) The vacancy shall be first offered to the junior qualified protected employee deprived of employment in the seniority district where the vacancy exists, and each such employee shall have 20 days to elect one of the options set forth in paragraph (1) of this subsection. If that employee elects not to accept the transfer, it will then be offered in inverse seniority order to the remaining qualified, protected employees deprived of employment on the seniority district, who will each have 20 days to

elect one of the options set forth in paragraph (1) of this subsection.

(B) If the vacancy is not filled by the procedure in paragraph (4)(A) of this subsection, the vacancy will then be offered in the inverse order of seniority to the qualified protected employees deprived of employment on the system and each of such employees will be afforded 30 days to elect one of the options set forth in paragraph (1) of this subsection.

(C) The provisions of this paragraph shall not prevent the adoption of other procedures pursuant to an agreement made by the Corporation and representative of the class or craft of employees [1] involved.

(5) In the case of a marine craft or class on the Corporation's system, or in the craft or class of a Penn Truck Lines, Incorporated, employee transfers to vacancies requiring a change in residence shall be subject to the following:

(A) The vacancy shall be first offered to the junior qualified protected employee or employees deprived of employment in the seniority district where the vacancy exists, and each such employee shall have 20 days to elect one of the options set forth in paragraph (1) of this subsection. The Corporation shall determine the number of junior qualified protected employees deprived of employment (not to exceed four employees per offer) who will be included in the offer of transfer. The vacancy will be awarded to the most junior qualified protected employee who accepts transfer. Other qualified protected employees who have accepted the transfer will retain their status as employees deprived of employment. Employees junior to the acceptor who have elected one of the options set forth in paragraph (1) of this subsection shall retain the option. If the vacancy is not filled, it may be

offered in inverse seniority order to remaining qualified protected employee(s) deprived of employment (not to exceed four employees per offer) in the seniority district.

(B) If there are no qualified protected employees deprived of employment in the seniority district where the vacancy exists, the vacancy may be offered in inverse seniority order to qualified protected employees deprived of employment (not to exceed four employees per offer) on the system, in accordance with the procedure in subparagraph (A) of this paragraph. Employees offered transfer pursuant to this paragraph will be afforded 30 days to elect one of the options set forth in paragraph (1) of this subsection.

(C) The provisions of this paragraph shall not prevent the adoption of other procedures pursuant to an agreement made by the Corporation and representatives of

the class or craft of employees involved.

(D) When no bona fide vacancies exist in such craft or class, the Corporation may offer such employee comparable employment for which the employee is qualified, or for which the employee can be trained, in another craft or class. The Corporation shall first attempt to locate a comparable position in a seniority district which encompasses the employee's last work location, and if successful, a transfer notice may be tendered pursuant to subparagraph (A) of this paragraph. If no such position exists, the Corporation may tender the employee a transfer notice involving a position elsewhere on the system pursuant to subparagraph (B) of this paragraph. In the event it is necessary to train an employee after such employee's acceptance of a position pursuant to this paragraph, such training shall be provided by the Corporation at no cost to the employee.

(e) Separation allowance. - A protected employee who is tendered and accepts an offer by the Corporation to resign and sever his employment relationship in consideration of payment to him of a separation allowance, and any protected employee whose employment relationship is severed in accordance with subsection (d) of this section, shall be entitled to receive a lump-sum separation allowance not to exceed $20,000 in lieu of all other benefits provided by this subchapter. Said lump-sum separation allowance, in the case of a protected employee who had not less than 3 nor more than 5 years of service as of January 2, 1974, shall amount to 270 days pay at the rate of the position last held and, in the case of a protected employee having had 5 or more years' service, shall amount to the number of days' pay indicated below at the rate of the position last held dependent upon the age of the protected employee at the time of such termination of employment:

60 or under . . . . . 360 days' pay

61 . . . . . 300 days' pay

62 . . . . . 240 days' pay

63 . . . . . 180 days' pay

64 . . . . . 120 days' pay

(f) Termination allowance. - The Corporation may terminate the employment of an employee of a railroad in reorganization who has less than 3 years' service with such railroad, as of January 2, 1974. The Corporation's right to terminate an employee must be exercised within a period of 1 year from the date of conveyance, pursuant to section 743 of this title. Upon notification to the employee of the Corporation's intent to terminate his services, the employee shall have the option of accepting the termination allowance or of accepting a voluntary furlough without pay. If the employee entitled to receive a lump sum separation allowance accepts such an allowance, the amount shall be determined as follows:

2 to 3 years' service . . . . 180 days' pay at the rate of the position last held.

1 to 2 years' service . . . . 90 days' pay at the rate of the position last held.

Less than 1 year's service. . 5 days' pay at the rate of the position last held for each month of service.

(g) Moving expense benefits. - Any protected employee who is required to make a change of residence as the result of a transaction shall be entitled to the following benefits -

(1) Reimbursement for all expenses of moving his household and other personal effects, for the traveling expense of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss, not to exceed 10 working days. PROVIDED, That the Corporation or acquiring railroad shall,

to the same extent provided above, assume said expenses for any employee furloughed within 3 years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the Corporation or acquiring railroad within 90 days after the date on which the expenses were incurred.

(2)(A)(i) If the protected employee owns, or is under a contract to purchase, his own home in the locality from which he is required to move and elects to sell said home, he shall be reimbursed for any loss suffered in the sale of his home for less than its fair market value. In each case, the fair market value of the home in question shall be determined as of a date sufficiently prior to the date of the

transaction so as to be unaffected thereby. The Corporation or an acquiring railroad shall in each instance be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person.

(ii) A protected employee may elect to waive the provisions of paragraph (2)(A)(i) of this subsection and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in the jurisdiction in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed $3,000 or 6 percentum of sale price, whichever is less), and any prepayment penalty required by the institution holding the mortgage; such costs shall not include the payment of any "points" by the seller.

(B) If the protected employee holds an unexpired lease on a dwelling occupied by him as his home, he shall be protected from all loss and cost in securing the cancellation of said lease.

(C) No claim for costs or loss shall be paid under the provisions of this paragraph unless the claim is presented to the Corporation or an acquiring railroad within 90 says after such costs or loss are incurred.

(D) Should a controversy arise with respect to the value of the home, the costs or loss sustained in its sale, the costs or loss under a contract for purchase, loss or cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or his representative, and the Corporation or an acquiring railroad. In the event they are unable to agree the

dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the Corporation or acquiring railroad and these two, if unable to agree upon a valuation within 30 days, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days a third qualified real estate appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne

equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by the party.

(h) Application of subchapter. - Should a railroad rearrange or adjust its force in anticipation of a transaction with the purpose or effect of depriving a protected employee of benefits to which he otherwise would have become entitled under this subchapter, the provisions of this subchapter will apply to such employee. Provisions of this subchapter shall be applied, upon a conveyance or discontinuance of service, to employees who are otherwise entitled to protective benefits and who were placed in furlough status on or after February 26, 1975.

(i) Noncontract employees. - Compensation, severance, termination and moving expense benefits for employees not governed by a collective-bargaining agreement shall be

consistent with subsections (b), (c), (e), (f), and (g) of this section and shall be in accordance with the following provisions:

(1) A protected employee, whose employment is not governed by the terms of a collective-bargaining agreement, may be required by the Corporation, upon reasonable notice, to transfer to any position in the Corporation's system. If such transfer requires a change in residence, the employee may either voluntarily suspend his employment at his home location in lieu of protective benefits, or he may sever his employment and receive a benefit computed in accordance with subsection (e) or (f) of this section. These provisions supersede all provisions or conditions in subsection (d) of this section. The Corporation may simultaneously offer a position to not more than 4 protected non-contract employees. The position shall be given to the protected employee accepting transfer whom the Corporation considers to

be best qualified for the particular position involved. Other protected employees who have accepted the transfer shall retain their previous status. Employees who have elected a voluntary suspension of employment at their home location in lieu of protective benefits or a severance of employment shall retain the option elected.

(2) If any dispute arises between the Corporation and a non-contract employee regarding the interpretation or application of any provision of this subchapter, the Corporation shall establish a resolution procedure with arbitration as the final step. Such resolution procedure shall be the exclusive means available to the parties for resolving such dispute, and any arbitration decision rendered shall be final and binding on all parties. Either party may request arbitration and the cost and expenses of such arbitration shall be shared equally by the parties.

(3) Except as otherwise provided in this subchapter, a protected employee whose employment is not governed by the terms of a collective bargaining agreement and who has been deprived of employment shall not, during the period in which he is entitled to protection be placed in a worse position with respect to any voluntary relief plan benefits or preretirement benefits provided under any life or medical insurance plan, except that the level of benefits to which such an employee is entitled under this paragraph shall not exceed the level of benefits which is afforded to the Corporation's active non-contract employees of comparable age, position, and level of compensation.

Pub. L. 93-236, Title V, §§ 505, Jan. 2,1974, 87 Stat. 1015, amended Pub. L. 94 - 210, Title VI, § 616 (a)-(g), Feb. 5, 1976, 90 Stat, 115, 116; Pub. L. 94-555, Title II, §§ 209, 210, Oct. 19, 1976, 90 Stat, 2623; Pub. L. 96-448, Title V, §§ 501-503, Oct. 14, 1980, 94 Stat, 1948-1954.

§ 776. CONTRACTING OUT

All work in connection with the operation or services provided by the Corporation on the rail lines, properties, equipment, or facilities acquired pursuant to the provisions of this chapter and the maintenance, repair, rehabilitation, or modernization of such lines, properties, equipment, or facilities which has been performed by practice or agreement in accordance with provisions of the existing contracts in effect with the representatives of the employees of the classes or crafts involved shall continue to be performed by said Corporation's employees, including employees on furlough. Should the Corporation lack a sufficient number of employees, including employees on furlough, and be unable to hire additional employees to perform the work required, it shall be permitted to subcontract that part of such work which cannot be performed by its employees, including those on furlough, except where agreement by the

representatives of the employees of the classes or crafts involved is required by applicable collective bargaining agreements. The term "unable to hire additional employees" as used in this section contemplates establishment and maintenance by the Corporation of an apprenticeship, training, or recruitment program to provide an adequate number of skilled employees to perform the work.

Pub. L. 93-235, Title V § 506, Jan. 2, 1974, 87 Stat. 1019.

§ 777. ARBITRATION

Any dispute or controversy with respect to the interpretation, application, or enforcement of the provisions of this subchapter, except section 774(d) of this title, section 779(b) of this title, or section 779(c) of this title and those disputes or controversies provided for in subsection (g) (2) (D) of Section 775 of this title and subsection (b) of Section 774 of this title which have not been resolved within 90 days, may be submitted by either

party to an Adjustment Board for a final and binding decision thereon as provided in section 153 Second of this title, in which event the burden of proof on all issues so presented shall be upon the Corporation, or where applicable, the Association.

Pub. L. 93-236, Title V, §507, Jan. 2, 1974, 87 Stat. 1020, amended Pub., L. 96-448, Title V-§ 508(e) Oct. 14, 1980, 94 Stat. 1957.

§ 778 DUTIES OF ACQUIRING AND SELLING RAILROADS

(a) Acquiring railroads - (1) An acquiring railroad shall offer such employment, subject to such rules and working conditions, and afford such employment protection to employees of a railroad from which it acquires properties or facilities (including operating rights) pursuant to this chapter, and shall afford such protection to its own employees who are adversely affected by such acquisition, as shall be agreed upon between such acquiring railroad and the representatives of such employees prior to such acquisition, except

that the protection and benefits (except as to rules and working conditions) provided for protected employees in such agreements shall be the same as those specified in Section 775 of this title. Unless and until such agreements are reached, the acquiring railroad shall not enter into purchase agreements pursuant to section 716(d) (4) of this title. For purposes of this subsection, the National Railroad Passenger Corporation shall be deemed to be an acquiring railroad, with respect to employees described in section 771(3) of this title.

(2) If the National Railroad Passenger Corporation acquires rail properties of a railroad in reorganization in the region, prior to the date of conveyance of rail properties to the Corporation pursuant to section 743(b)(1) of this title but after the publication of the preliminary system plan, it shall offer such employment and afford such employment protection to employees of a

railroad from which it acquires rail properties and shall further protect its own employees who may be adversely affected by such acquisition, as shall be agreed upon between the National Railroad Passenger Corporation and the representatives of such employees prior to such acquisitions. The protection and benefits provided for employees in such agreements shall be the same as those specified in Section 775 of this title, and such protection and benefits shall supersede conflicting provisions in any previously applicable job stabilization agreements or agreements implementing such stabilization agreements, and the National Railroad Passenger Corporation shall be reimbursed for expenses incurred as a result of any such acquisition, as provided in Section 779 of this title.

(b) Selling Railroads - A selling railroad shall offer such employment and shall provide such employment protection to each of its employees who are adversely affected by such sale, pursuant to agreement to be

entered into between it and the representatives of such employees prior to said sale: PROVIDED, That (1) the protection and benefits provided for protected employees in such agreements shall be the same as those specified in section 775 of this title, and (2) unless and until such agreements are reached, the selling raiload shall not enter into selling agreements pursuant to section 716(d) of this title.

Pub. L. 93-236, Title V, § 508, Jan. 2, 1974, 87 Stat. 1020, amended Pub. L. 94-210, Title VI, § 617, Feb. 5, 1976, 90 Stat. 117.

§ 779. PAYMENTS OF BENEFITS

(a) Payment - The Corporation, the Association (where applicable), replacement operators, and acquiring railroads, as the case may be, shall be responsible for the actual payment of all allowances, expenses, and costs provided protected employees pursuant to the provisions of this subchapter. The Corporation, the Association, (where applicable) replacement operators, and acquiring railroads shall then

be reimbursed for the actual amounts paid to, or for the benefit of, protected employees, pursuant to the provisions of this subchapter (including such amounts paid by the employer prior to the effective date of the Staggers Rail Act of 1980 and training costs incurred by the Corporation, pursuant to Section 775 (d)(4)(D) of this title), other than provisions with respect to employee pension benefits, not to exceed an aggregate sum of $485,000,000, by the Railroad Retirement Board, upon certification to such Board in such detail as the Board may reasonably require, by the Corporation, the Association (where applicable), replacements operators, and acquiring railroads, of the amounts paid such employees, except that the aggregate amount of reimbursement made by the Board for the payment of monthly displacement allowances in the period after the effective date of the Staggers Rail Act of 1980 shall not exceed $18,000,000. There is authorized to be appropriated to the

Secretary annually such sums as may be required to meet the obligations payable under this subchapter, not to exceed the aggregate sum of $485,000,000. Upon the exhaustion of such authorization, the Corporation, the Association (where applicable), replacement operators, and acquiring railroads shall retain responsibility for the payment of benefits otherwise reimbursable under this subchapter, but they shall not be reimbursed therefor. There is further authorized to be appropriated to the Secretary such sums as may be necessary to provide for additional administrative expenses to be incurred by the Railroad Retirement Board in the performance of its functions under this section. Appropriations authorized under this section may be allocated by the Secretary to the Railroad Retirement Board.

(b) Audit - Beginning October 1, 1980, the Association shall conduct a program audit of the payment of benefits pursuant to this subchapter and shall evaluate the effectiveness

of the provisions of this subchapter in improving the Corporation's management of certain protected employees in its workforce who are entitled to receive monthly displacement allowances. Such audits and evaluations shall be conducted in accordance with such rules and regulations as the Association may prescribe. The representatives of the Association shall have access to all books, accounts, records, reports, files and other papers, things, or property belonging to, or in use by or in connection with, the Corporation, replacement operators, acquiring railroads, or the Railroad Retirement Board which pertain to the benefits provided protected employees pursuant to this subchapter and which are necessary to facilitate such audit and evaluation.

(c) Report - The Association shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed

report on the payment of benefits under this subchapter and the effectiveness of the provisions of this subchapter in improving the Corporation's management of certain protected employees in its workforce who are entitled to receive monthly displacement allowances.

Pub. L. 93-236, Title V, § 509, Jan. 2, 1974, 87 Stat. 1020, Amended Pub. L. 94-210, Title VI, § 616(h), Feb. 5, 1976, 90 Stat. 116; Pub. L. 94-555; Title II, § 207(c), Oct. 19, 1976, 90 Stat, 2622; Pub. L. 96-448, Title V, § 504 Oct. 14, 1980, 94 Stat. 1955.

§ 780. RAILROAD HIRING

Any protected employee of the Corporation and any employee of the Corporation who is separated or furloughed from his employment with the Corporation (other than for cause) shall unless found to be less qualified than other applicants, have the first right of hire by any other railroad that is subject to regulation by the Commission for any vacancy that is not covered by (1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by

Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan. For purposes of this section, a railroad shall not be considered to be hiring new employees when it recalls any of its own furloughed employees.

Pub. L. 93-236, Title V, § 510, as added Pub. L. 94-448, Title V, §505, Oct. 14, 1980, 94 Stat. 1956.

Opposition

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NO. 81-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LESLIE R. HINDS, DARLENE THOMAS, CRESCENIO S. MIRANDA, DANIEL GAILLIARD and WILLIAM S. SMITH,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the Special Court, Regional Rail Reorganization Act of 1973, utilized the appropriate standard of equal protection review when evaluating the constitutionality of the methods for calculating employee protection payments under the Staggers Rail Act of 1980.

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CONSOLIDATED RAIL CORPORATION and THE UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Opinions Below, Jurisdiction and Statutes Involved are adequately set forth in the Petition for a Writ of Certiorari (hereinafter "Petition").[1]

[1]The Respondent also incorporates by reference the Petition's Appendix, which includes the Memorandum Opinion and Order of the Special Court, filed July 22, 1981, for which review is sought.

STATEMENT OF THE CASE

The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (1980) (hereinafter "Staggers Act") altered the methods of calculating the employee income protection payments provided under the Regional Rail Reorganization Act of 1973, P.L. 93-236, 87 Stat. 985 (1973) (hereinafter "RRR Act").[2] Title V of the RRR Act provided that employees of the bankrupt railroads whose properties were conveyed to the Consolidated Rail Corporation (hereinafter "Conrail") could receive income supplements termed "monthly displacement allowances" (hereinafter "MDAs") if adversely affected in compensation subsequent to the conveyance. §505(b). Initially, the formula for calculating the MDAs was identical for all employee job classifications. The formula calculated "average monthly compensation" based on the total compensation received by the employee and the total time paid for during the twelve months preceding January 1, 1975. Under the RRR Act an employee who received less in his current position than his average monthly compensation was entitled to receive an MDA.

The experience under Title V of the RRR Act was of excessive benefit payments overall and gross inequities among groups of employees. As a response, Congress amended the RRR Act with §501 of the Staggers Act, and thereby divided protected employees into four generic categories (operating, non-operating, maintenance-of-way, and non-contract employees), removed inequities

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[2]The effects of the Staggers Act amendments were short-lived, for under the Northeast Rail Service Act of 1981, P.L. 97-35, 95 Stat. 643 (1981), Title V was repealed. Thus, the Staggers Act amendments only affect the calculation of MDAs for the period October 1, 1980 through September 1, 1981.

by providing different methods of calculating MDAs for each employee category, and generally reduced benefits. One of the several alterations in the calculations of MDAs was the exclusion of overtime from the compensation base for non-operatng and maintenance-of-way employees. While operating employees had their MDAs reduced by a "cap", they retained overtime and other allowances ("arbitraries") in their compensation base.

It is Petitioners' position that the amended methods for calculating MDAs, specifically the exclusion of overtime and arbitraries from the compensation bases of non-operating and maintenance-of-way employees, substantially denies financial assistance to the non-operating and maintenance-of-way employees while retaining it for operating employees, and thereby violates the Fifth Amendment's guarantee of equal protection.

This Petition for Certiorari is before the Court because the Special Court, Regional Rail Reorganization Act of 1973, granted the Defendant's motion for summary judgment. Petition at 1A-46A. Composed of Judges Friendly, Wisdom, and Thomsen, the Special Court held that, under the standards set forth in *United States Railroad Retirement Board* v. *Fritz*, 101 S.Ct. 453 (1980), the Staggers Act established a rational classification system for calculating MDAs, and therefore did not violate the Fifth Amendments.[3]

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[3]It should be noted that under provisions of the RRR Act for judicial review of Special Court decisions, a contrary decision that the Staggers Act is unconstitutional would have been reviewable by direct appeal to the Supreme Court. 45 U.S.C. § 719(e)(3) (1976). Presumably, Congress wanted questions concerning the constitutionality of the Act, which could hinder the operational integrity of the northeast rail system, to be resolved expeditiously.

Petitioners claim this Court should dispel what they perceive to be confusion resulting from inconsistent application of standards of review in equal protection challenges. The thrust of their argument is that the Court's decisions have been inconsistent with its stated two-tier equal protection analysis, especially those cases where the minimal scrutiny rational basis test has been applied. Petitioners entreat the Court to modify the rational basis test to bring harmony or "congruence" to equal protection analysis. Petition at 31. The Court should, according to the Petitioners, articulate a general "sliding-scale" equal protection analysis, utilizing this case as the appropriate vehicle for such a development in constitutional law. Under Petitioners' sliding scale approach, the Court would weight five factors, including the nature and importance of both the individual interest and the governmental interest, the availability of alternative means, and the extent to which the various classes are similarly situated with respect to need and entitlement to benefits. Petition at 48.

Petitioners are confident that such an equal protection analysis, when applied to the Staggers Act, would yield a determination of unconstitutionality. In the alternative, if the Court refuses to adopt this sliding scale approach, the Petitioners would have the Court establish new guidelines for the application of the rational basis test requiring more stringent review of legislative purpose. Petition at 56. Under this approach, Petitioners claim they would prevail because, in their view, the Special Court improperly hypothesized a congressional purpose underlying the Staggers Act that is completely at odds with the purpose stated by Congress. Petition at 36, 49-53, 57-59, 63-64.

REASONS FOR DENYING THE WRIT

1. The appropriate standards of review in equal protection cases have already been stated with clarity by this Court, and, under those standards, the classification at issue clearly is constitutional.

Petitioners argue that sliding scale equal protection review is appropriate under the Fifth Amendment and is applicable to the classification scheme of the Staggers Act. Whatever limited virtue there may be to sliding scale equal protection analysis,[4] there should be no question that an intermediate standard of review is irrelevant here. This is not a case involving a classification on the basis of gender[5], or alienage,[6] or illegitimacy,[7] areas in which two-tier equal protection anaylsis arguably is unsatisfactory. Rather, this case deals with the allocation of social welfare entitlements, and it is beyond cavil that rational basis equal protection scrutiny applies to such classifications. *Califano* v. *Boles*, 443 U.S. 282 (1979); *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Matthews* v. *DeCastro* 529 U.S. 181 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

Indeed, the Court unequivocally reaffirmed the applicability of rational basis equal protection scrutiny to social welfare classifications only last term in *Railroad*

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[4]*See generally* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[5]*See Califano* v. *Webster*, 430 U.S. 313 (1977).

[6]*See Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

[7]*See Graham* v. *Richardson*, 403 U.S. 365 (1971).

Retirement Board v. *Fritz, supra.* In that case, the Court resolved the very issue the Petitioners would raise in the instant case—"the appropriate standard of judicial review to be applied when social and economic legislation enacted by Congress is challenged as being violative of the Fifth Amendment to the United States Constitution." 101 S.Ct. at 458. We submit that this case is governed by the rational basis test reaffirmed in *Railroad Retirement Board,* and that the Special Court accurately applied this standard.

The *Railroad Retirement Board* decision clarified the appropriate standard to be used in a challenge to congressional restructuring of railroad employee benefits. As in the instant case, Congress selectively removed from certain employees benefits which it perceived to be "windfalls." Recognizing that its earlier pronouncements had not been altogether consistent, the Court was conscious of specifying the limits of appropriate judicial scrutiny in such cases. Thus, it stated clearly that statutes should not be invalidated when simply deemed "unwise or unartfully drawn." *Id.* at 459. Even if a classification is "imperfect", or it results in "some inequality", it is lawful if it has "some reasonable basis." *Id.* citing *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). Moreover, when Congress could have eliminated benefits altogether, "it is not constitutionally impermissable for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits." *Id.* 460. In short, the judiciary should only look to whether "Congress achieved its purpose in a patently arbitrary or irrational way." *Id.*

The Court clearly foreclosed intrusive examination of the factual underpinnings of Congress' action, as well as

the judicial "second-guessing" advocated by Petitioners. As the Court cautioned, "it is not within our authority to determine whether the congressional judgment expressed in [the statute] is sound or equitable or whether, it comports well or ill with purposes of the Act." *Id.* at 459, quoting *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960). Congress need not articulate its reasons for enacting a statute and the judiciary may hypothesize congressional reasoning:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether the reasoning in fact underlay the legislative decision' . . .

Id. at 461, quoting *Flemming* v. *Nestor,* 363 at 612. Indeed, even if Congress was "unaware" of the results of its actions or was "misled", the legislation could not be overturned because when the language of a statute is clear, "we have historically assumed that Congress intended what it enacted." *Id.*

The analysis prescribed by *Railroad Retirement Board* v. *Fritz* was accurately applied by the Special Court in the instant case. The court carefully examined whether the classifications drawn in the Staggers Act had a reasonable basis and determined that Congress did not act in a patently arbitrary or irrational way.

Writing for the Court, Judge Wisdom emphasized that the Staggers Act was the subject of careful consideration by Congress, and that the elimination of overtime in the calculation of the base year earnings for maintenance-of-way and non-operating employees was but one of a number of changes in the computation of MDAs to achieve the congressional objectives of the conservation of scarce government resources and the

elimination of inequities and windfalls. Petition at 13A-14A, 27A. As the court emphasized, the reductions in MDAs were spread among all categories of Conrail employees; and therefore, Plaintiffs' attempt to confine the debate to the issue of overtime and arbitraries is not persuasive, because it ignores the numerous other contributing factors to MDA computations under the Staggers Act. Petition at 28A. For example, operating employees had their MDAs reduced by means of a "cap" or ceiling in their guaranteed compensation and by a seasonal adjustment provision designed to offset excessive MDAs due to seasonal changes in workload. The court found that the net effect of the Staggers Act amendments, as measured by the relative change in each class's share of the total MDAs paid before and after their enactment, was not large. Petition at 29A. From this finding, the Special Court properly concluded that the aggregate result of the Staggers Act amendments to Title V is "highly rational." *Id.*

2. The Special Court did not hypothesize a congressional purpose at odds with the stated purpose of the Staggers Act.

The Petitioners attempt to bolster their position that the Special Court in some manner improperly applied equal protection review by asserting that they demonstrated "without contravention" or "disagreement on the part of the Special Court" that overtime and arbitraries were not part of the basic compensation structure for operating employees, Petition at 50, and that in response the Special Court improperly hypothesized a congressional purpose wholly at odds with the statute's stated purpose. Petitioners' argument not only erroneously magnifies

one aspect of a complex legislative scheme, but also misstates the Special Court's reasoning and written opinion.

As stated above, the Special Court viewed the overall scheme of Staggers Act amendments to Title V as rational and constitutional. But the court then went on to address the Petitioners' narrow and hypertechnical argument that the inclusion of overtime and arbitraries in the operating employees' compensation bases, while excluding the same factors from non-operating and maintenance-of-way employees' bases, was unconstitutionally irrational. Petition at 30A. The court noted, citing the legislative history, that Congress was aware that operating employees had a unique "dual rate of pay" compensation system, characterized by payments for miles traveled as well as hours worked, and that under this system, overtime and arbitraries were considered a basic part of operating employees' wage structure. Petition at 30A-31A. Petitioners' assertion that they conclusively proved this congressional assumption to be false can only be described as the unreliably biased perception of an advocate. In fact, the Special Court stated that Petitioners' argument that arbitraries and overtime were in the scheduling discretion of the carrier "proves nothing." Petition at 31A.

The Petitioners inaccurately allege that the Special Court improperly hypothesized a congressional purpose in reviewing the constitutionally of the Staggers Act. What the Special Court actually did was explain why Congress accurately perceived overtime and arbitraries as a basic part of the compensation structure for operating employees. The Special Court

noted the proven fact that overtime and arbitraries constituted nearly a third of the total compensation paid to operating employees, and concluded that Congress "could reasonably have assumed that operating employees generally receive a larger proportion of their compensation in the form of extras than do other classes of employees." Petition at 31A-32A. As the court went on to note, Plaintiffs made no showing that non-operating or maintenance-of-way employees as a class systematically received as large a proportion of their compensation in the form of overtime or other extras. *Id.*

In addition, the court rejected the Petitioners' argument that because only 35 percent of operating employees' time is spent on the road (when the dual basis of pay rule is applicable), a decision to include overtime and arbitraries in their base rate is irrational. Petition at 32A-33A. Rather, the court interpreted the 35 percent statistic as providing strong justification for a separate benefit calculation method for operating employees. *Id.*

The Special Court correctly concluded that the Staggers Act scheme for allocating Title V benefits, even when viewed in the Petitioner's own narrow context, passes constitutional muster. Overall, the Special Court's analysis of Petitioners' equal protection challenge to the Staggers Act was a careful, conscientious review of a highly technical system of benefits by experienced jurists with special expertise in railway matters. The Special Court's decision does not deserve its mischaracterization by Petitioners.

There can be no doubt that the Special Court correctly applied the rational basis equal protection

review dictated by *Railroad Retirement Board* v. *Fritz*. Petitioners seeds nothing short of the overruling of *Railroad Retirement Board* v. *Fritz* and a complete reformulation of equal protection analysis. Unless the Court wishes to pursue such a course, it should deny the Petition for Certiorari.

CONCLUSION

For the foregoing reasons, Respondent Consolidated Rail Corporation respectfully submits that the Petition for Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973 should be denied.

Respectfully submitted,

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No. 81-792

In the Supreme Court of the United States

OCTOBER TERM, 1981

LESLIE R. HINDS, ET AL., PETITIONERS

v.

CONSOLIDATED RAIL CORPORATION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REGIONAL RAIL REORGANIZATION ACT OF 1973

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim that Section 501 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Staggers Act), which amended Section 505(b) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701-794 (RRR Act), discriminates irrationally among different categories of railroad workers entitled to "monthly displacement allowances."

1. At the center of this controversy is Congress' formula for calculating "monthly displacement allowances" (MDAs) for railroad workers. Section 505(b) of the RRR Act originally authorized MDA payments for all protected employees[1] based on a single formula. MDA payments

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[1] A protected employee is any person under 65 years of age, other than a corporate officer, who was employed by one of Conrail's predecessor railroads as of January 2, 1974. 45 U.S.C. 771(3).

granted pursuant to that formula were adjusted upward to reflect general wage increases in the industry. Through January 1979, there were nine such increases for many Conrail employees (Pet. App. 9-A to 10-A).

In 1980, the Staggers Act amended Section 505(b) to divide protected employees into four categories and to provide a new method for calculating MDA payments for the members of each category. Petitioners claim (Pet. 49-55) that the effect of those amendments was to deny or to reduce substantially the MDA entitlement of non-operating employees and maintenance-of-way employees while providing substantially the same benefits for operating employees and employees not covered by a collective bargaining agreement. Petitioners further assert that Congress' formula for awarding MDA benefits is so irrational as to infringe the Due Process Clause of the Fifth Amendment.

2. Petitioners originally filed this action in the United States District Court for the Eastern District of Michigan (Pet. App. 4-A). Conrail then filed an action in the Special Court seeking to enjoin the district court proceeding (*id.* at 53-A to 54-A).[2] After the Special Court enjoined petitioners from prosecuting their action in the district court (*id.* at 54-A to 70-A), petitioners filed their complaint for injunctive and declaratory relief in the Special Court (*id.* at 71-A to 106-A).

On cross motions for summary judgment, the Special Court upheld the constitutionality of the Staggers Act amendments (Pet. App. 1-A to 46-A). The court ruled (*id.* at 5-A to 7-A) that the "rational basis" test was the appropriate standard for judicial review of the constitutionality of the statutory provision in question. After carefully tracing

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[2]The United States intervened in the Special Court (Pet. App. 61-A).

the legislative history and the government's prior experience under the RRR Act (*id.* at 7-A to 27-A), the court determined that Congress had a rational basis for the establishment of the four categories of employees and the four different formulas used to calculate their MDA benefits.

3. Petitioners argue (Pet. 28-55) that this Court should grant review in this case to establish more definite criteria to evaluate equal protection challenges to economic welfare legislation. They further claim that a "sliding scale standard of review" should be applied in this category of cases (*id.* at 37, 48), and that the propriety of legislative classifications in this area must rest on express statements of congressional purpose rather than hypothetical statements of congressional intent (*id.* at 56-64).

Contrary to petitioners' argument, however, there is no need for further review to establish governing criteria under the Fifth Amendment. The applicable standard is set forth in *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980). *Fritz* acknowledged that, while there may have been inconsistency in some of the Court's past decisions,

> [i]n more recent years, * * * the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.
>
> * * * * * *
>
> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," *Flemming* v. *Nestor*, 363 U.S. [603, 612 (1960)], because this Court has never insisted that a legislative body articulate the reasons for enacting a statute.

Id. at 175, 179. This standard was reiterated by the Court only a few months later in *Schweiker* v. *Wilson*, 450 U.S. 221 (1981). Since the Special Court applied the *Fritz* standard in the present case, there plainly is no need for further review of the legal principles adopted by the court.

4. In any event, there is virtually no support for petitioners' contention that the Special Court erroneously "hypothesized" a legislative purpose in analyzing the rationality of Congress' classifications. The court carefully examined the statute and traced its legislative history (Pet. App. 7-A to 27-A). It determined (*id.* at 27-A; footnote omitted) that Congress had "specifically found that the dissimilarities in the ways the four categories of employees are usually compensated made it appropriate to treat each class differently." It also held (*id.* at 28-A) that petitioners erred in attempting to confine the "rational basis" analysis solely to the issue of how the elements of overtime and "arbitraries"[3] are used to compute MDAs. By doing so, petitioners ignored "the numerous other factors that go into MDA computations under the Staggers Act" (*ibid.*).

The court also carefully examined the economic effect of Congress' MDA standards and concluded that "[w]hen the effect * * * is aggregated, the result is highly rational" (Pet. App. 29-A). The court found that the reductions in the MDA payments were spread evenly among all four classes of employees (*ibid.*). And, most significantly, it found that "within each class of employees the impact of the Staggers Act falls by far most heavily on those who least needed MDAs—that is, those employees who continue to work for Conrail" (*id.* at 30-A). Thus, the court's review of the statute

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[3] "Arbitraries" are flat payments for specific services, such as coupling air hoses connecting cars, or for particular hardships, such as enduring delays in the scheduled start or arrival time of a train (Pet. App. 21-A to 22-A).

and its legislative history established that Congress' classifications accomplished precisely what Congress intended, not what the court hypothesized that Congress intended.

5. Finally, we note that the Northeast Rail Service Act of 1981, which is part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 643-687, totally eliminates supplemental income protection for Conrail employees (see 95 Stat. 669). Thus, the claims asserted in the petition do not have any continuing practical significance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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